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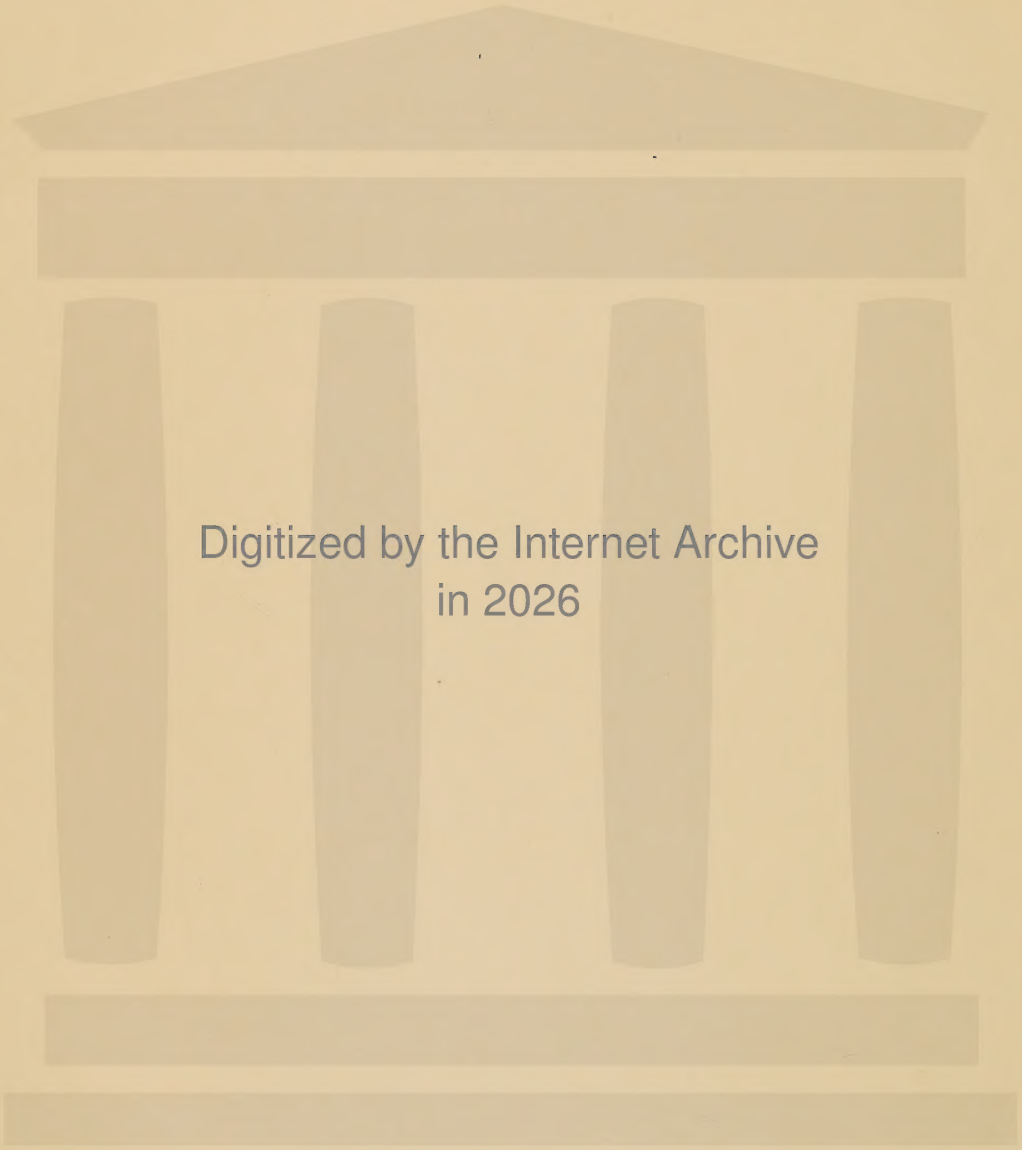

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FOREWORD

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VOL. 11

1942

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THE ALBANY LAW REVIEW

of

RECENT DECISIONS

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CHILD LABOR - THE COURT'S DILEMMA

The question whether or not children should be allowed to play an important part in industry has long been a vexatious problem. It has been both opposed and substantiated upon many different theories, moral, social, economic, and most important and significant, constitutional.

The battle has waged on, fiercely and unendingly. Thus far the opponents of child labor seem to have been the more successful, in their attempts to nullify any national legislation on that subject. All the legislation on the part of Congress under the guise of interstate commerce or taxation has been negatived in past action by the Supreme Court.

It is not the purpose of this article to take a stand one way or another in regard to the economic benefit or moral aspects of the child labor question, nor to attempt to show what action the States have taken or will take concerning that problem. The main purpose will be to attempt to show the present attitude of the United States Supreme Court in deciding whether or not future legislation under the guise of interstate commerce will be declared constitutional, or whether it will be called invalid, thus necessitating an amendment to the Constitution of the United States to bring about the desired end. One need not be a student of Constitutional Law to see clearly that one of two events must occur to bring about permanent child labor acts: either the Supreme Court must reverse former decisions and call such legislation valid, or the people of the United States must seek once again to amend their Constitution. It does not appear likely that Congress will attempt to pass any such legislation under its taxation power, and it seems even less likely that the Supreme Court will deviate from former holdings in which it declared that the "doing of business with children" was not taxable.

Under §8 Article I of the Constitution, Congress has, as we know, "the power to lay and collect Taxes, Duties, Imports and Excises, to pay and to provide for the common defense and general welfare of the United States, but all Duties, Imports and Excises shall be uniform throughout the United States." Several times in the past, Congress has attempted to levy taxes on industry employing children, but each time the Supreme Court has held that such taxation is not intended to raise money, but is regulatory in its nature, and as such it is an invasion of the rights left to the sovereign States.

In Bailey v Drexel Furniture Co., 259 U.S. 20, the Court took a definite stand upon this subject. Congress had passed The Child Labor Tax Law (Act Feb.24,1919, Title 12 S 1200), which imposed a tax of 10% of the net income on persons employing child labor. The statute read that every person working in any mill, cannery, mine, quarry, workshop, factory, or manufacturing establishment situated in the United States must be over the age of 14 years, and if between the ages of 14 and 16 years a maximum hour scale was listed.

Violation of this by the employer would result, in addition to all other taxes, in a tax of 10% on the entire net profits. The argument of the Drexel Furniture Company in an action against J. Bailey as collector of Internal Revenue for the District of North Carolina was direct and to the point. The company sued for taxes paid under protest, stating that the statute was unconstitutional in its attempt to regulate child labor. The defense stated that this tax was a pure excise levied by the Government under the broad taxing powers.

Chief Justice Taft in delivering the opinion of the Court, in which only Mr. Justice Clarke dissented, called the statute void and unconstitutional. The Chief Justice stated that the statute clearly was not intended to raise money, but was regulatory; and went on to say that if such legislation were allowed to pass, Congress could, under the word "tax", run our daily lives and completely wipe out the sovereignty of the States. The Court was loud in its denunciation of the statute as invading states' rights in the name of a tax, and it firmly stated that such would not be allowed.

This case can be distinguished from that of McCray v United States, 195 U.S. 27, which was decided many years earlier, in 1904. Here the Oleomargarine Act of 1886 (32 Stat. 193) as amended in 1902 was in question. The United States sued McCray for the statutory penalty of $50, alleging that as a licensed dealer in oleomargarine he had, in violation of the Act of Congress, knowingly purchased for resale a 50-pound package of oleomargarine artificially colored to look like butter, to which there were affixed internal revenue stamps at the rate of 1/4¢ per pound, upon which the law requires stamps at the rate of 10¢ per pound. McCray's defense was that said Act was an unwarranted interference with the police power reserved to the States; that such an Act was intended to protect the butter industry and was not a means of taxation as intended by Article I §8 of the Constitution.

Mr. Justice White delivered the opinion of the Court, in which the Chief Justice, Mr. Justice Brown and Mr. Justice Pecham dissented. The Court said that the Act is not unconstitutional, since Congress may select objects upon which a tax may be levied. The power to tax is an extensive one with but two qualifications - it cannot tax exports and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited it may reach every subject. The motive behind the tax, whether regulatory or not, and whether oppressive or not, will not and can not be determined by the Courts.

It is obvious that the purpose of this tax was regulatory, to protect the butter industry. This is no concern of the Federal Government, it being purely a State function. Nevertheless, the Supreme Court upheld the statute calling it a valid tax since it could be said that it was in fact raising revenue. This can be distinguished from the Baily v. Drexel Furniture Co. case in that, while the Court in this later decision admits that Congress can tax anything it desires, such as materials and the right to do business, it refuses to allow the taxing of the "doing of business with children." The Court was not at all clear in the Bailey case as to

the reason for the holding, but it definitely stated that a tax could not be laid upon a business merely because it employed children

One is unable to discern whether or not the holding was based upon the fact that Congress was taxing something which it could not tax, or whether the statute was a regulation and not a tax. This lack of clarity seems sharpened then by the earlier holding in the McCray case. Since that case established the principle that a tax which is in effect a real tax designed to collect revenue cannot be called unconstitutional because it is regulatory, we must then of necessity determine that the Bailey case decided that the statute involved in that litigation was unconstitutional, not because it was regulatory, but rather because it was an attempt to tax and regulate that over which Congress has no power - the doing of business with children.

It would then appear that the Court will refuse to allow child labor legislation to be advanced under the guise of taxation. While it is true that the Court is becoming more and more lenient in its upholding of taxes which seem regulatory in nature, nevertheless Bailey v. Drexel Furniture Company still is the law, and there is no reason to believe that the Court will reverse itself. Even though we are now engaged in a great war, and taxes of all types and descriptions are being created daily, all these measures are intended purely and simply to raise revenue. Since a child labor tax is intended more as a regulation than a means of profiting the treasury, the fact that our coffers need a constant flow of money would not close the Court's eyes to the fact that such legislation will not raise revenue, and therefore, the old argument still prevails.

While it is true that in times of stress, such as a great war, our Courts are more apt to construe the Constitution according to the economic and physical needs of the country, still a tax under the guise of child labor is not so important to the monetary status of the Government as to cause a reversal of former opinion. It seems at the present that Bailey v Drexel Furniture Company is and will be the law of the United States for some time to come.

But strong as the Supreme Court has been in its viewpoint of taxation, it has been growing increasingly lenient in its interpretation of what are the limits of the Congress in its power over interstate commerce. With but few exceptions, the Court has been giving the Federal Government broader and broader powers by a most liberal interpretation of a simple clause in the Constitution: - "Congress has the power to regulate commerce with foreign nations and among the several states and Indian Tribes." Ever since Chief Justice Marshall's famous decision in Gibbons v. Ogden, 9 Wheaton 1, which was reached in 1824, the interstate commerce clause is being extended. As a result or offspring of the Gibbons case, the definition of what is interstate commerce has been enlarged to cover all forms of intercourse between the states, and the regulatory powers imposed on Congress by the Constitution and aided by the Supreme Court are growing steadily larger and more omnipotent.

Despite the fact that the Constitution does not specifically grant to the Federal Government the exclusive privilege of controllin

interstate commerce, the Congress was given that exclusive privilege by the holding reached in the case of Leisy v. Hardin, 135 U.S. 100. This case, decided as late as 1890, established the principle that the power to regulate interstate and foreign commerce is vested exclusively in the Federal Government, although not specifically stated. The Court was concise in stating that where subject matter required a uniform system as between the States, the power controlling it must and should be vested exclusively in Congress and can not be encroached upon by the States.

After being told by the Gibbons case that all intercourse between the States was interstate commerce, Congress was given additional power and impetus by the Court's telling it that Congress and Congress alone had power to regulate interstate commerce. This was of course limited by a former holding in the case of Cooley v. Port Wardens, 12 Howard 299, which showed that the exclusive power was not of such a character as to deprive the States from controlling a local condition in which the Federal Government had not passed legislation. When such was the case, the States under a proper exercise of the police power were allowed to pass reasonable legislation insofar as it did not directly impede interstate commerce.

Therefore, with its long arm reaching deeply within the realm of that which once seemed to be powers reserved solely for the States, it was not long before sweeping legislation began to show itself under the encompassing banner of interstate commerce. The reserved power of the States had been made subject to great invasions. To quote Professor Ralph E. Rogers, Professor of Constitutional Law, Albany Law School, "The power of Congress has been gradually extended into fields which are primarily reserved to the States. The principal extension has been in police regulations, designed primarily to protect the safety, health or morals of the people, which are usually based on the power of Congress to regulate commerce."

The case of Hoke v. United States, 228 U.S. 308, was an excellent example of the growing liberal tendency of the Court. The action was one of error to review a judgment of conviction under an Act of Congress of June 25, 1910, entitled "An Act to Further Regulate Interstate and Foreign Commerce by Prohibiting the Transportation of Women and Girls in Interstate Commerce for Immoral Purposes", - more commonly known as the White Slave Act. The constitutionality of the Act was assailed by demurrer. The Act rendered guilty of a felony anyone participating in the sending of women across State lines for the purposes of prostitution. Effie Hoke claimed that the regulation of prostitution rests solely with the States - that the States alone have the reserved power to regulate public morals. Mr. Justice McKenna in delivering the wise and just opinion of the Court declared that the unanimous holding of all the Justices found the statute constitutional. The principle established by the case is a simple one, when rid of confusing and distracting considerations Congress has the power over transportation among the several States. That power is complete in itself, and Congress, as an incident to it may adopt means not only necessary, but also convenient, to its exercise, and the means may have the quality of police regulations. In this respect the Court was following the definition of the "necessary and proper" clause as formulated by John Marshall in the historically famous McCulloch v. Maryland, 4 Wheaton 316.

But actually the Court was permitting the Federal Government to invade a right reserved for the States. This statute was a regulation in name only; it was a regulation in words only. It was not helping the flow of commerce to keep certain women from travelling over State lines. The same analogy can be drawn to statutes forbidding lotteries and indecent literature from passing through the mails. Yet the courts have permitted Congress so to regulate, even though the regulation is only in words, if the evil aimed at is one of public detriment. Although the Act aimed at a problem reserved for the States, it has been held a valid regulation of commerce and is allowed. The Lindberg Act is a similar type of legislation which has been deemed valid. In none of the examples cited does the subject of regulation bear a direct effect upon interstate commerce, yet all have been deemed proper subjects of legislation.

With this sweeping and momentous decision, it is little wonder that the decision handed down in Hammer v Dagenhart, 247 U. S. 251, caused such surprise throughout the nation. Here for the first time the issue of child labor and its relation to interstate commerce was clearly and directly placed before the Court. In view of the holding of the Hoke case, it seemed quite likely that the Court would have called the statute in question valid, but it did not.

In 1916, Congress passed a child labor statute (Act, September 1, 1916, 6.432 139 Stat. 675) under its power to regulate interstate commerce. This Act prohibited the transportation in interstate commerce of products of mines or factories in which, within 30 days prior to removal, children under the age of 14 were employes, or children between the ages of 14 and 16 were employed or permitted to work more than eight hours a day or more than six days in any week. A bill was filed by a father in behalf, and as next friend, of his two minor sons, one under 14 and the other between 14 and 16 - both of whom were employed in a cotton mill in Charlotte, North Carolina. The bill sought to enjoin the enforcement of the Act of Congress intended to prevent interestate commerce in the products of child labor. The District Court held the Act unconstitutional. In delivering the opinion of the Court, Mr. Justice Day stated that the controlling question for decision was, whether such an act prohibiting the transportation of certain goods made by child labor was within the power of Congress. The majority opinion of the Court deemed the Act to be outside the scope of Federal authority and therefore invalid. "This Act cannot be sustained as an exercise by Congress of its power to regulate commerce between the States, for the products of child labor are in themselves inherently harmless, for the Act instead of being one regulating commerce would serve to bring under Federal control to the practical exclusion of the authority of the States all manufacture of articles intended for interstate shipment."

Mr. Justice Holmes in dissenting seemed to have far the more logical outlook, for how could the Court possibly decide this statute was invalid if the Hoke case set a precedent? Mr. Holmes states that the Act was strictly a regulation of interstate commerce, although the motive behind it undoubtedly was to control an intrastate function. "The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and

domestic commerce as they like. But when they seek to send their products across the State line, they are no longer within their rights. Under the Constitution, such commerce belongs not to the States, but to the Congress to regulate."

It seems absolutely impossible to reconcile this case, decided June 3, 1918,with Hoke v. United States, decided only a few years earlier. Both involved similar situations, yet one of them was deemed valid and the other, similarly cloaked, was declared null and void. It is true that neither of the statutes was an actual help to interstate commerce as such. The passage of persons and materials would be equally free, whether or not the statutes had been passed. Both Acts were regulations in "words" only.

Nevertheless, the Supreme Court in its attempt to reach the desired end deemed the White Slave Act a valid exercise of Congressional power as a regulation of interstate commerce. How then could it call a similar act regulating child labor unconstitutional? There can be but one answer. The Acts in and of themselves are analogous. The Court was aiming at definite evils. Evidently it came to the conclusion that prostitution is a greater crime than the exploitation of children. It appears that the Court put a greater emphasis on sex than on protecting the life and fortune of our future American citizens. June 3, 1918, was an unfortunate day for children throughout the United States. At this point the Court was still deciding problems under a constitutional rather than an economic or a social outlook - that legislation dealing with the subject of child labor under the guise of either interstate commerce or taxation, was taboo. What had had the apparent beginning of a more liberal outlook suddenly had been dimmed once again by the cloak of conservatism.

Again in 1935 the advocates of "broader and greater powers for Congress", in regard to power over intrastate commerce, received a severe setback by the Court's holding in the famous Schecter Poultry Corporation v. United States, 295 U.S. 495. The Court sharply defined and limited the power of Federal legislation over intrastate commerce. The Schecter Brothers were convicted of violating the N.R.A. Live Poultry Code. The contention of the defendants was that the Act invaded the sacred sphere of State rights. The Act provided in effect that the President can approve codes for fair competition and the following code was approved by him: "In any transaction affecting interstate or foreign commerce, a fine of $500 will be imposed unless the Live Poultry Dealers conform to a standard set of wages, hours, and working conditions." The defendants violated the conditions as set forth, but they claimed it had no application to them, since they were engaged solely in intrastate commerce. It appeared that almost all the poultry came from without the State, but the defendants made their purchase at a local terminal and sold the meat within the State. The Court could well have decided that such a business was so closely connected with interstate commerce as to have a direct effect upon it, thus giving Congress power to increase their scope of regulation.

The Court held that such a statute was unconstitutional in that the slaughter of poultry was out of the "flow" of interstate commerce. The learned Justice said, in delivering the opinion of the

Court, that the mere fact that there was a constant flow of material into the State did not mean that the flow continued after the material arrived, for there the material became commingled with a mass of property within the State which was held solely for local use. The Court further held that the flow ceased when the defendants did not sell outside of the State, and therefore any attempted legislation of a Federal nature was unconstitutional. The Justice stated that the business did not affect interstate commerce, which Congress could legislate to protect from injury; that such business affected only local conditions. Therefore the law was called unconstitutional as violative of a right reserved to the States. This holding did not seem plausible to those proponents of stronger Federal powers, especially to those who had hoped to see a more liberal Court some day declare that a statute regulating child labor was a proper exercise of Congressional authority. This series of cases decided since Hoke v. United States, were significant in that they revealed a complete backtracking since the prior holdings. The Court was not at this time giving Congress a free hand to deal with objects which apparently were within the shadow of Federal authority, if not within the actual body. The once liberal outlook was seemingly intrenching itself upon a more conservative footing.

Then on April 12, 1937, the Supreme Court took a drastic step forward. Perhaps because its body was gradually becoming infused with the blood of members of a newer and broader school of thought, or perhaps because of the realization that a change had taken place in our economic structure, the Court sounded a clarion call as to its future conception of the power of Congress and interstate commerce. For it was on that date that the opinion was handed down in the case of National Labor Relation Board v. Jones & Laughlin Steel Corp., 301 U.S. 1.

In 1935, the National Labor Relations Act (29 U.S.C.A. §151) was designed to protect interstate commerce from injuries caused by industrial strife. Certain practices "affecting" interstate commerce were to be eliminated. The National Labor Relations Board found that the defendant had violated the Act by engaging in unfair labor tactics affecting interstate commerce. The defendant was accused of discriminating against union members in regard to hiring employees; that it was coercive to employees. The Act which created the Board and gave to employees a right to bargain collectively also defined unfair labor tactics and gave the Board power to carry out its dictates. The defendant steel corporation claimed the Act regulated local labor and not interstate commerce. The defendant maintained that it was engaged solely in intrastate commerce since its plant merely manufactured steel.

The Court, in reachings its decision, used a completely new departure in its insight into the problem. It seemed to say that it was not necessary to decided whether something is in the "flow" of commerce, as did the Schecter case, but that the important thing was to see the effect upon interstate commerce, rather than the cause. The Court stated practices which impair interstate commerce can be regulated, regardless of the source. The critical words of the Act are "practices affecting interstate commerce." This was found to mean anything which burdens commerce. Acts which directly

burden commerce, growing out of local labor disputes, are not immune to Federal legislation because they seem wholly intrastate in nature, -to quote the Court: "Although the activities are intrastate in nature, when they have such a close relationship to interstate commerce that their control is essential to protect interstate commerce, Congress will intervene." The statute, therefore, the Court declared constitutional.

There would appear to be very little difference between this case and the earlier Schecter case, except that here the Court was once more employing the liberal outlook it had expressed in the Hoke case. The Justice of the Supreme Court decided that certain practices should be regulated, and arrived at a decision. The Schecter case should certainly have been overruled, but the Court distinguished it. Today it would be held to its facts.

The Court's newly revived liberal attitude in regard to the interstate commerce clause and its extension seemed to be endless in its scope. Its decisions continued to give more and more freedom to Congress, and the invasion into the rights reserved to the States seemed boundless. A perfect example of this extension is seen in the case of United States v. Appalachian Electric Power Co., 311 U.S. 377, decided December 16, 1940; a rehearing was denied January 20, 1941. The case involved the scope of the Federal commerce power in relation to conditions in licenses, required by the Federal Power Commission, for the construction of hydro-electric dams in navigable rivers of the United States. To reach the issue a decision was required as to the navigability of the New River, a water course flowing through Virginia and West Virginia. The District and Circuit Court of Appeals had both held that the river was not navigable and that the United States could not enjoin the respondent from constructing a hydro-electric dam. No boats could travel the stream because of rapids.

Mr. Justice Reed delivered a startling opinion, with only Mr. Justice Roberts and Mr. Justice McReynolds dissenting. The Court said that the power of the United States to regulate commerce necessarily includes power over navigation upon waters which are capable of use as interstate highways. "Navigability," said Mr. Justice Reed, "for purposes of Federal control does not depend solely upon the natural and ordinary conditions of a river, which refers to volume of water and gradients of flow. Availability must also be considered in determining whether a river is navigable, and the feasibility of interstate use after reasonable improvements, regardless of whether the improvements are actually completed or even authorized, may properly be considered." The Court upheld the United States in the action to enjoin the erection of the dam.

The actual meaning and extent of their decision is breathtaking for the Court went beyond all previous bounds to aid Congress in its all-out control of anything which so much as sounded like interstate commerce. It said plainly that any river is under interstate commerce when it is navigable or can be made so. This is saying, in effect, that all rivers are subject to Federal control This seems indeed like a complete discard of all former barriers in a new and determined attempt by the Court to make Congress all-powerful in matters affecting interestate commerce, whether or not pertaining directly thereto.

With such an attitude, it does not seem at all unlikely that the present Supreme Court - the most liberal of any ever to assemble in Washington - would uphold a child labor statute under the guise of interstate commerce. There is no reason to believe that the Court would today uphold the decision reached in Hammer v Dagenhart, and it is far more logical to predict that the former holding would be reversed. Such prediction is substantiated by the latest case decided by the Supreme Court which bears a direct relationship to the present problem - United States v. Darby, 312 U.S. 100 - decided February 3, 1941. The holding here would clearly seem to overrule Hammer v. Dagenhart. The Court does not expressly state the fact to be true, but it is nevertheless the obvious implication. Here the Court for once decided to go all the way, and while the question of child labor is not present, the Court leaves few doubts in our minds as to what it would have done, and what it may do if that question is presented.

The Fair Labor Standards Act of 1938 (§32) set up a scheme for preventing shipment in interstate commerce of certain commodities produced under adverse labor conditions, by setting up the following regulation: The Statute said in effect that it was unlawful to ship any goods in interstate commerce in the production of which any employee was paid less than 25¢ an hour for the first year, with 44 hours a week as the maximum without increased wages for overtime. Darby was engaged in the lumbering business, processing logs into lumber and sending these out of the State. He violated the wages and hours section of the statute and was subjected to a fine of $15,000. He claimed the Act was unconstitutional since he was engaged in manufacture wholly within the State.

Justice Stone in delivering the decision of the Court established a new and vital principle, one which will be so far-reaching in its scope as to give Congress powers it never before possessed. The Court said that anything which passed into interstate commerce can be regulated! In this respect it was echoing the holding in the Hoke case decided many years back. The decision read that, while manufacturing is wholly within the State, the shipment of goods can be regulated when in interstate commerce. "The power to regulate is the power to describe the rule by which commerce is governed." The Court further held that such regulation is not an invasion of State rights. "The motive for the Act is a matter of legislative judgment over which the Judiciary has no control. Whatever the motive, so long as the act itself is not unconstitutional, it will be upheld by the Court."

It is not necessary to analyze deeply to recognize the wide range of the significance of a decision by the Court that any article which passes in interstate commerce can be regulated, despite the fact that it appears to invade the rights reserved to the States. The Court has told us that we should not look for the motive; even if it be one of regulation of intrastate commerce, the motive is of no concern! It has declared that the article itself can be regulated when it is an integral part of interstate commerce.

If such be the present attitude of the Supreme Court it would seem a foolish gesture to amend the Constitution of the United

States to bring about a successful child labor act. If the Court follows its upholding the Darby case, it must of necessity decide that Congress has power to create such conditions as it desires, attaching to articles passing in interstate commerce. Although Hammer v. Dagenhart has not been overruled specifically as of this date, it appears inevitable that when such a statute is once again presented and its constitutionality assailed, the Court will deem it valid.

It seems a far step from some of the earlier decisions, but today the rights which once were deemed sacred to the States are in danger of being completely usurped by the Federal Government. The Court under its new and altogether liberal attitude in regard to the extent of interstate commerce and the powers exercised over it by Congress, has discarded all previous boundaries. Under the Darby case, it would appear that all matters even remotely pertaining to interstate commerce are capable of legislation, although intrastate in nature. Such a view is not at all inconsistent with the holding in United States v. Appalachian Electric Company. The Court no longer looks at motives behind the legislation; and if the words "interstate commerce" are attached, the legislation will be called constitutional despite the fact that formerly it was deemed to be solely within the realm of the individual States.

It seems quite probable that if and when the Congress will pass legislation forbidding the passage of articles in commerce which are manufactured by children under a certain age, the Supreme Court will call such legislation constitutional. No other inference can be drawn if we are to believe what was said in United States v. Darby, the most recent decision handed down by our venerable Court. So long as the articles are transported in interstate commerce, the Federal Government can prescribe the conditions under which they must pass, and if child labor is one of them, it will be deemed constitutional.

Thus while it is the opinion of many that the Darby case has overruled Hammer v. Dagenhart, it would still appear that the Supreme Court has refused to allow child labor statutes under the guise of taxation, since Bailey v. Drexel Furniture Company is still the law, and appears to be in no danger of being overruled. If a child labor statute is to be brought about, it seems quite safe to say that it will be under the disguise of a regulation of interstate commerce and not under the power of Congress to tax.

The Supreme Court today is composed of a body of men who determine the law, as well they should, with a view to the social and economic changes which have developed in our country. Today we are engaged in what may be a long and destructive World War. Just what effect this will have upon our Supreme Court in making future decisions is a matter of conjecture. If they are confronted with the problem of child labor, it seems highly likely that in view of our present great needs for economic expansion and increased productivity, they will revert to the holding of Hammer v. Dagenhart in order to prevent a cessation of production caused by a removal of youth labor.

Such a question cannot be anwered at present because we have no adequate means of basing a prediction of a future attitude. We do know that Wartime produces strange results both in the field of legislation and in the decisions of the Judiciary. All that can be said is, the welfare of the United States comes before the welfare of any particular class or group of persons, whether they be children or not. If the Court deems it expedient to keep children at work to preserve our democratic form of government, its decision will revert back to Hammer v. Dagenhart.

On the other hand, if we take a more logical view of present conditions; if we consider the present attitude of the Court; if we consider the most recent holdings of the Supreme Court; if we believe the Court is stable enough to follow as precedent the recent decisions, then we must necessarily conclude that the Court will concede child labor legislation pertaining to interstate commerce as a valid exercise of Federal power, - and that means to the desired end would obviate the necessity of an amendment to the Constitution of the United States.

S. WILLIAM ROSENBERG

DISMISSAL OF PUBLIC SCHOOL TEACHERS

As the law student thumbs through his daily assignment of cases, he sometimes gives rein to his imagination and tries to visualize the parties and personalities involved. For instance, let us take §565 of the Education Law. It reads prosaically enough:

> DISMISSAL OF TEACHER. No teacher shall be removed during a term of employment unless for neglect of duty, incapacity to teach, immoral conduct, or other reason which, when appealed to the Commissioner of Education, shall be held by him sufficient cause for such dismissal.

However, if the annotations to the New York Statutes were written by newspaper men rather than lawyers, the following might well appear beneath this particular section:

> EX-TEACHER INVOLVED IN SCANDAL IS SUICIDE. New York, Dec.24 [1941] (AP) Isabel Hallin, 32, the honey-haired former Saugus, Mass., schoolmarm who was fired - and later exonerated by a jury - on charges of serving cocktails to members of the high school dramatic club rehearsing in her home, was found dead today in her Greenwich Village apartment. Gas was escaping from two jets of a kitchen range. Detective Dennis Egan, who made the identification, said that the body was six feet from the kitchen door and that the woman apparently took her own life. In July, 1937, she was accused of having served the cocktails to student actors in a play she was rehearsing in her capacity as drama teacher. It developed later that the report gained circulation because the drama class had held its rehearsal in the cellar of her home where there was a small bar. The pretty blonde teacher denied holding "whoopee" parties at her home, and proved to the school board's satisfaction that no drinks had been served, and she was exonerated, but she was not re-appointed to the teaching staff, and later went into newspaper work, and she also was screen-tested for the films. Miss Hallin brought a slander suit against Mrs. Minnie B. McDuffie, temperance worker, in connection with the case, but obtained a verdict of only $1. Miss Hallin's father was quoted in Saugus as having said he had been expecting her home for Christmas. *

The question occurs, just what sort of conduct on the part of the teacher justifies his or her dismissal? Following is a brief collation of the statutes and cases applicable to the subject:

Article 13 §6 of the New York Constitution reads: "When the duration of any office is not provided by this constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment." This provision changes the common law rule, and by virtue if it the State reserves the power of summary discharge. And were it not for Education Law §525 above, which is authorized by this constitutional provision and also by Article 13 §10, the State would be able to

*From ALBANY KNICKERBOCKER NEWS, Jan. 7,1942: Saugus, Mass., (AP). Isabel Hallin, former high school teacher, has been exonerated by the Saugus School committee of "all unjust accusation against her character" - 11 days after her death in her gas-filled New York apartment....One of the committeemen who voted for her removal was among those voting last night to exonerate her name. No reason was given for the committee's action.

remove a teacher without notice or hearing. (People ex rel. Gere v. Whitlock, 22 N.Y. 191.)

First of all it should be noted that a teacher cannot be removed from his position except for the causes specified in Education Law §565, and in the manner specified in Education Law §872 ("Teachers....shall not be removable except for cause, after a hearing, by the affirmative vote of a majority of the board.") (Matter of Stafford, 21 St.Dept. 144.) However, in Matter of Board of Education, 49 St. Dept. 372, the teacher was charged with having misrepresented to the Board that she was single although she knew that the Board had officially decided to employ only unmarried women teachers. Her defense was that for family reasons she did not desire the facts as to her marriage to be generally known. The Commissioner (all these State Department reports are handed down by the Commissioner of Education) held that this was no excuse for failing to disclose the facts to the Board. It will be noted that these cases are reviewed much as the Appellate Division examines the verdict of the jury in the case appealed. The Commissioner will not substitute his judgment for that of the Board. By the holding in this case, a teacher who has not yet acquired tenure, is bound not only by the provisions of the statute, but also by the additional requirements imposed by her contract.

But, to examine the cases to see what facts constitute (1) "Neglect of duty", (2) "Incapacity to teach", (3) "Immoral conduct", and (4) "Other reason":

In Matter of Mynie, 53 St. Dept. 208, the teacher struck one of her pupils with a ruler while in the classroom. The Commissioner held that had corporal punishment been forbidden by a formal resolution of the school district, an infraction of such rule by the teacher might have been a sufficient basis for dismissal, But, as no rule was shown to exist, there was not sufficient cause here to justify the teacher's dismissal. In Matter of Stanbro, 30 St.Dept. 633, the principal was accused of having "brutally and severely beaten with a heavy, thick rubber hose" four pupils. The principal admitted the punishment but denied the brutality. She showed that the hose had been furnished to her by her superior, and that all four boys had been able to attend school the next day. The Commissioner held that the trustees of the district were justified in deciding not to dismiss Miss Stanbro. However, Mr. Begun (52 St. Dept. 270) stepped over the line. At the meeting at which the Board was discussing the charges brought against him, he became excited and refused to yield the floor, although so ordered by the Board. In fact, he became so wroth and violent that he had to be ejected from the room by the police. This misconduct was held to be sufficient reason to justify his removal. It was not specifically stated whether this decision was based upon the teacher's rude conduct, or his failure to obey the command of the Board. It might be questioned whether proof of rude conduct on a single occasion outside of the schoolhouse would be sufficient proof of "incapacity to teach."

Nearly all the dismissals based upon incapacity to teach have been based on failure to maintain discipline. The reason this is considered a material defect is tersely stated in Matter of Zeiner,

27 St. Dept. 680, where the teacher had trouble in maintaining discipline in her classes, and indeed the discipline in the whole school was bad. This was the sole complaint against her, for it was conceded that her preparation and training were sufficient, as she was a graduate of Hunter College and of Columbia University. Nevertheless she was dismissed, the Commissioner holding, "without good government and discipline, learning is of little avail." While this seems to the layman a rather harsh ruling, experienced teachers know that a poorly taught lesson and bad discipline are ne essarily concomitant. So, what appears to be a dismissal because of failure to maintain good discipline is actually a dismissal for incapacity to teach, in a great many cases. The following sets of facts have been held to be sufficient cause for dismissal: Failure to maintain discipline and failure to comply with a rule that the school should not be closed until 4 p.m. (Matter of Austin, 50 St. Dept. 32); The existence of great disorder in the classes conducted by the teacher, which condition grew worse during the progress of the fall term (Matter of Dietz, 37 St. Dept. 19); Laxity in discipline, and failure to establish good order although so instructed by the Board of Education, and a failure to report any offenders of good order to the principal although ordered to do so by the principal (Matter of Addis, 13 St. Dept. 390).

But allowing the pupils to use profane and obscene language on the school grounds and in the schoolhouse was not sufficient to justify a dismissal where there were only six weeks remaining of the 36-week term, and where the teacher denied the allegations, and the charges of the trustees were based solely upon information and belief. (Matter of Mulcay, 6 St. Dept 531) And where there is a conflict of evidence as to whether the teacher maintained order and proper discipline in the classroom, and poor discipline was not clearly shown, the teacher should not be discharged. Incidentally, it is interesting to note that sometime previous to the dismissal, the teacher had been a "somewhat activating factor in" initiating and promoting certain charges of immorality against the superintendent of the schools. (Matter of Healy, 20 St. Dept. 193) A somewhat similarly groundless suit was brought by the foster mother of a pupil; she sought to have the teacher removed on the ground that she was temperamentally incompetent and unfit to act as a teacher, by reason of various acts which she had failed to prove. Indeed, it appeared that the petitioner's daughter had been expelled from school by the trustee because of bad conduct. The Commissioner dismissed petitioner's charge. (Matter of Sharp, 40 St. Dept 33). It is interesting to compare these lack-of-punishment cases with the cases mentioned wherein certain types of corporal punishment were frowned upon. It seems that failure to maintain discipline, and failure to discipline by proper methods both show incapacity to teach, and would justify dismissal.

Only one case was found where dismissal was based upon a charge of general incompetency. This paucity is no doubt due in part to the high standard which New York maintains in its requirements for a teaching license. In Matter of Morton, 39 St. Dept. 9, the teacher exhibited an uncontrollable temper in the classroom, used immoderate language, and was unsympathetic and over-critical towards the pupils. These defects continued over a period of years. The Commissioner

held that her dismissal by the Board was justified, - the dismissal being of course based upon incapacity to teach.

Several dismissals have been predicated upon the teacher's failure to obey rules laid down by the trustees, or by the Board of Education. In Matter of Stearns, 39 St. Dept. 48, the trustee made rules concerning the length of the school recess, the use of the room for the hanging of coats and other similar matters connected with the management of the school. The teacher ignored these rules, considering them unreasonable, and was consequently discharged by the trustee. The Commissioner held that this was sufficient to constitute insubordination, and justified dismissal. If the teacher considered the rules unreasonable, his remedy would have been, to appeal to the Commissioner. In Matter of Winne, 37 St. Dept. 386, the teacher was notified to attend a meeting of the Board of Education to be held at 7:30 in the evening at the high school, at which meeting it was decided to dismiss her. She informed three members of the Board that she would be unable to attend because she had a prior engagement which she considered unbreakable. Then she was notified to attend a meeting to be held the following night, but she again failed to appear. She now claims that she misunderstood the conversations as to the time of the latter meeting, and presents evidence tending to support her claim. The Commissioner held that the Board had a right to demand her attendance, even though it was not provided in her contract that she should attend such meetings; and had she not given a reasonable excuse, her failure to attend would have constituted insubordination justifying dismissal. But, under the circumstances shown in the case, the Board was not justified in finding her insubordinate. Matter of DeLee, 52 St. Dept. 47, is a truly amusing case, and one which received much notoriety in the newspapers when it was decided. When the trustee hired the teacher, he told her that he did not wish her to use corporal punishment, and advised her that she should open the school not later than 8:30 in the morning. She occasionally broke these rules. Then complications arose concerning the display of the American Flag. Hallowe'en pranksters had put the flagpole out of commission, so the trustee ordered the teacher to stand a large flag in a conspicuous place in the school. She refused, and produced a small flag which she had brought herself, and placed it in the schoolroom. When the trustee ordered her to put his large flag up, she told him to mind his own business and that she wouldn't use his flag. She told him, "It is too large." The Commissioner held that this was a violation of rules and regulations in matters over which the trustee clearly had jurisdiction and was admittedly defied, and therefore it could not be said that the trustee exceeded his authority in exercising his prerogative of dismissing the teacher.

It is also insubordination to be absent from duty without justifiable excuse. Absence for purposes of maternity is no ground for dismissal (Matter of Ross, 40 St. Dept. 157). But absence on account of illness, under some circumstances, may be sufficient ground for removal (dicta in People ex rel. Peixotto v. Board, 160 App. Div. 557). But the prize case is Matter of Frothingham, 15 St. Dept. 498. There the teacher did not show up on the day that school opened because she was at the time in the workhouse in Virginia, under a 60-day sentence for picketing the White House, and had refused to pay bail although she had had the funds. The Commissioner held

that her incarceration was not a justifiable excuse for her absence from school, as her inability to return was occasioned by her own voluntary act. The cases in this latter group are obviously based upon neglect of duty. It is to be noted that in all these, there was a wilful and sometimes obstinate and long-continuing refusal to obey the rules of the Board. The dictum that illness under some circumstances may be sufficient cause, would seem to be against the general rule that incapacitating illness of the employee does not constitute a breach of a contract for personal services.

There have been quite a few cases delineating the latitude of comment a teacher may exercise both in and out of the classroom. In Matter of Robins, 22 St. Dept. 326, it was shown that the teacher had said to a student, "You are a liar, a thief and a cheat"; and also she had said that the school reminded her of a lot of foreigners; that the school was a discredit; and she had advised some of the students to go elsewhere to school. It was further shown that there were errors in the record of attendance which she kept. Two teachers claimed that she had interfered with their class work. The accused teacher showed that the student addressed had disobeyed her by obtaining the answers from the books to problems in arithmetic given as a test, and that she had explained to him and to the class that such an act constituted cheating, lying, and thieving. She explained that the school did not give enough credit for certain subjects, as the reason for her advising the students to go elsewhere. She denied the other statements, and gave explanations of the interference with the teachers. The Commissioner held that the facts charged, when standing alone and unexplained, would be sufficient to warrant her dismissal, but in the light of all the attendant circumstances, her conduct was not such as to justify her dismissal. In the Matter of Glassberg, 33 St. Dept. 261 (1922), the teacher made statements to his history class to the effect that the United States Government was suppressing the true reports with regard to the Russian Bolsheviki, and that being a teacher, he was not allowed to tell his pupils the truth. When asked by a pupil if the Red flag should fly above the American flag, he replied, "In a sense", without giving further explanation. This was held to be sufficient to warrant his dismissal. In Matter of Mufson, 18 St. Dept. 393, the maintenance by the teacher of an attitude of strict neutrality in class discussions dealing with the relative merits of anarchism as compared with the present Government of the United States, coupled with other charges, was held sufficient cause. In Action of Board of Education, 28 St. Dept. 145, the teacher while discussing current events, particularly the Irish question, made several statements derogatory to the Roman Catholic religion and its adherents. The full discussion was not shown, and only disconnected phrases were presented. The Commissioner held that the Board was justified in refusing to dismiss the teacher. It would seem that these holdings are based upon incapacity to teach in the proper manner.

Because of the present international situation, the following cases are very topical: Matter of Pignol, 21 St. Dept. 270, is the leading case on the question, how much patriotism the teacher must possess and exhibit. In that case, the teacher, who was born in Berlin, had made statements to the effect that the war with Germany was unnecessary, and that she would not pledge her full co-operation

to the United States in its measures for the prosecution of the war. There was no evidence in the case that she had made these statements in the schoolroom, but only in response to questions put to her by the Board at the time her dismissal was being considered. The Commissioner held as follows: "Upon questions on which citizens generally may express different opinions or judgments, a teacher has a right to express her opinion and to form her own judgment. But there is no difference of opinion among the patriotic people of the State as to this matter. If the Board finds, upon due investigation, that a teacher is not loyal in support of her country's cause, it cannot do otherwise than exercise its disciplinary power." It is to be noted that these facts arose and the decision was handed down at a time when the United States was at war. Upon similar facts, a Quakeress who refused to urge her pupils to support the war, was discharged (Matter of McDowell, 21 St. Dept. 489, Writ of mandamus to compel reinstatement denied, with opinion, 104 Misc. 564). This case held that the fact that the teacher held this opinion, due to her religious beliefs, was no defense. Matter of Mufson, supra, goes even further. It holds, in effect, that a teacher has the duty of actively supporting the United States Government's war effort, by word and deed. There the failure to be personally in favor of the war; the failure to urge the students to support the war effort; the failure to discuss patriotism in school; and, permitting pupils to hand in themes which criticized the war, were all held to be sufficient cause for the dismissal of three teachers who did some of these acts.

Patriotism is not the only subject where the teacher's freedom of speech and action is circumscribed outside of the classroom. In Matter of Pratt, 25 St. Dept. 65, the teacher had joined the Communist Party, and had given a speech at a meeting of said Party. She later resigned because she was afraid of losing her job, her act having received wide publicity. Her dismissal was held justified. In Matter of Mufson, the teacher had, among other things, written a bibliography of current literature and placed the same in the store in the school. Some of the books in the fiction list were sub-titled as "The Hidden Springs of Sex and Desire", "Fragrant Kisses of Passion", etc. This was held to be sufficient cause. A border-line case is Matter of Shea, 27 St. Dept. 154. Here the offense was the "having knowledge of and consenting to the issuance of" a pamphlet concerning the local Teachers' League, which pamphlet "was detrimental to the welfare and general interests of the (local) public school system." The Commissioner upheld a ruling that the teacher should be dismissed unless she signed a written statement agreeing to co-operate with the Board in the future. But the fact that a teacher had signed an article in a newspaper, which article had advocated "revolutionary unionism" and the overthrow of capitalism, was held to be irrelevant in Matter of Glassberg, supra.

The teacher's marital status at times undergoes careful scrutiny by the Board. In general, a teacher who has tenure may not be dismissed because she marries (Matter of Thomas, 33 St. Dept. 12), but if she holds during the probationary period -the first three years services as a regular full-time teacher- and the contract provides against marriage, she may be dismissed. (Matter of Mandigo, 35 St. Dept. 633) As this is a delicate subject, sometimes the facts are such that the Commissioner's ruling can justly be criti-

cized, whichever way he decides a case. In Matter of Brown 39 St. Dept. 561, the facts were: The teacher bore an illegitimate child. It appeared that the father of the child was a former pupil of the teacher, and that bastardy proceedings had been successfully maintained against him. The teacher attempted to show that the intercourse had been without her consent and against her will, and that she was entirely guiltless of any immoral conduct. However, the Board refused to hear any evidence upon this defense, and decided that the fact that the teacher was living in the city with a child born out of wedlock was in and of itself sufficient cause for dismissal upon the ground that it rendered her unfit to teach, as it had caused much talk in the community. The Commissioner upheld the decision. The "Fragrant Kisses of Passion" case was no doubt based upon immoral conduct. It would seem that the anti-war and Communism cases are based on the other cause specified in §565. Because of the attitude of the nation at that time, it would seem undesirable to allow persons to draw salaries from the public school coffers and at the same time express sentiments in derogation of our form of government. Also the illegitimacy case shows the wisdom of allowing some discretion to the Commissioner. Indeed, the peculiar circumstances, although due to no fault of the teacher, caused incapacity to teach, much as serious sickness or a revolting physical injury might do.

Perhaps the most amusing case is Matter of Patterson, 55 St. Dept 452. There the teacher was dismissed because of his "gross disregard of his financial obligations and his refusal to make any satisfactory arrangements with his creditors." Indeed, several merchants were public-spirited enough to appear personally before the Board and give testimony concerning the teacher's derelictions. However, the Commissioner held that the teacher's private business affairs cannot be said to come within the purview of investigation on the part of the Board. While this case, in general terms seems to hold that non-payment of bills could never constitute cause for dismissal, nevertheless it would seem that long-continued, unjustified living beyond one's means might constitute a sort of immoral conduct on the part of the teacher, which would warrant censure.

To mention briefly the proper procedure for the accused teacher: The proper remedy is to stand trial before the Board; then, either to appeal, under Education Law §890 Subd. 4, to the Commissioner of Education, or, sue out a writ of certiorari, under Education Law §872 Subd. 3, and review in the courts the validity of the proceedings before the Board. (Cooke v Dodge, 164 Misc. 78). The teacher cannot sue for and recover his salary unless and until the determination of the Commissioner of Education that the discharge was justified, is set aside. Otherwise it is final and conclusive upon the teacher. (Levitch v. Board, 212 App. Div. 598)

In forming an opinion of the wisdom of the above decisions, the following facts should be kept in mind: (1) These are high school and grade teachers who are being removed, not college professors. Hence the restrictions to their freedom. (2) These cases are determined by the Commissioner of Education, not by the courts. The Legislature has seen fit to give complete power of determination of fitness to teach to the Board of Education, subject only to appeal

to the Commissioner, based upon the reasonable assumption that such persons are better fitted to make such decisions because of their close contact with the situation and their training and experience. Such persons, acting in a quasi-judicial capacity, may consider many intangible factors which, because of strict procedural rules, necessarily escape the purview of the law courts. Such factors must be considered in this particular type of proceeding.

B. FULLER ALLEN

NYE v. UNITED STATES

CONTEMPT OF COURT - ANOTHER VIEW OF THE CASE

Petitioners were adjudged guilty of contempt of court under §268 of the Judicial Code (36 Stat. at L. 1087, 1163, Ch.231, 28 U.S.C.A. §385) for their efforts to obtain a dismissal of a suit brought by one Elmore in the Federal District Court for the middle District of North Carolina. Elmore, administrator of the estate of his son, brought that action, in forma pauperis, against One Council and Bernard, partners, trading as B. C. Remedy Co., and alleged that his son died as a result of the use of a medicine known as BC and manufactured and sold by them. The court appointed William B. Guthrie to represent Elmore. Defendants filed an answer April 29, 1939. On April 19, 1939, Elmore notified the District Judge and his lawyer by letters that he desired to have the case dismissed. The substance of the episode involving the improper conduct of the petitioners was found as follows:

Elmore is illiterate and feeble in mind and body. Petitioners, through the use of liquor and persuasion, induced Elmore to seek a termination of the action. Nye directed his own lawyer to prepare the letters to the District Judge and to Guthrie and to prepare a final administration account to be filed in the local probate court. Nye took Elmore to the probate court, had him discharged as administrator, and paid the clerk a fee of $1. He then took Elmore to the postoffice, registered the letters, and paid the postage. Elmore, however, was not promised, or paid, anything. These events took place more than 100 miles from Durham, North Carolina.

On the hearing of a show cause order before the District Court it was held that petitioners' conduct was misbehavior so near to the presence of the court as to obstruct the administration of justice and adjudged each guilty of contempt of court.

The petitioners appealed the case to the Circuit Court of Appeals where the lower court's decision was affirmed. The case was brought to the United States Supreme Court on certiorari because the interpretation of the power of the Federal Courts under §268 of the Judicial Code raised matters of grave importance.

The United States Supreme Court held, by a divided court, that the petitioners were not guilty of contempt under §268 of the Judicial Code because the act complained of took place miles from the District Court, that the evil influence which affected Elmore was in no possible sense in the "presence" of the court or "near thereto." The Court said, "The question is whether the words 'so near thereto' have a geographical or a causal connection. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms."

The question is a matter of statutory construction as far as the courts are concerned. We will discuss that matter now and consider the question of public policy later on in this article.

The better to understand the result reached in the Nye case, (313 U.S. 33, 61 Sup. Ct. 810, 85 L. Ed. 1172) we should examine The history and growth of the present contempt statute.

The Act of 1789 (Stat. at L. 78, 83, Ch.20) provided that the courts should have power ..... to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.

In 1912 the case of United States v. Hudson & Goodwin, 7 Cranch 32, was tried by the United States Supreme Court. The question before the Court was whether or not the courts of the United States possessed any common law jurisdiction in cases of libel againstthe United States. Justice Johnson, speaking for the Court, said, "Certain implied powers must necessarily result to our courts of justice from the nature of the institution. But jurisdiction of crimes against the States is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts no doubt possess powers not immediately derived from statute...." This statement is pure dictum, but it is interesting to see that the early attitude of the courts was that the power to punish summarily for contempt was inherent in them and not derived from any statutory enactment. This statement was made despite the fact that at the time the contempt statute of 1789 was on the books.

With such a liberal outlook on the summary power of the courts to punish for contempts, abuses soon arose, and culminated in the famed, but now forgotten Peck-Lawless case.* Judge Peck was a Federal Judge in Missouri. At the time of his appointment there were a number of cases before his Court in Missouri involving the titles to land. Some of the titles were confirmed, others unconfirmed. Lawless, a lawyer, represented a large number of owners of unconfirmed grants. He brought a test case before Peck. Judge Peck decided against the clients of Lawless and his decision was such that, if persisted in, it would mean defeat for all the holders of unconfirmed claims. Lawless had some other claims before Judge Peck at the time the decision was announced. He published a scurrilous attack upon Judge Peck and analyzed and commented on the Judge's decision, distorting the grounds on which the decision stood. An appeal was pending at the time, from Judge Peck's decision. The Judge cited Lawless for contempt.

After four days of heated argument Judge Peck held Lawless guilty of contempt of court and sentenced him to one day's imprisonment and to be suspended from practice for eighteen months. Judge Peck was tried by impeachment for exercising this summary power which it was claimed he did not possess. He was acquitted, twenty-two Senators voting for acquittal and twenty-one for conviction. (There is not a reported decision in the case, nor on the contempt proceedings. The writer has borrowed his facts from an article by Nelles and King, 28 Columbia Law Review 401, 428.)

The day after Judge Peck's acquittal, Congress began consideration of a bill "to inquire into the expediency of defining by statute all offenses which may be punishable as contempts of the Courts of the United States, and also to limit the punishment of the same. (37 Harvard Law Review 1026.) The result was the Act

of March 2, 1831. It contained two sections, the first of which provided:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto, as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

By §2 it is provided:

> That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty or shall corruptly, or by threats or force obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

In construing these two sections, in Nye v. United States, Mr. Justice Douglas says: "The two sections of the Act of March 2, 1831, when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined."

Ex Parte Schulenburg, 25 Federal Reporter 211, was a case in which petitioner, while in attendance upon a Federal Court as a witness, was served with a writ of garnishment from a State court as he was going from the Court to his boarding-house. The question was whether or not the person causing the writ to be served was guilty of contempt of court. In holding that he was not, Judge Brown said: "But again, conceding that the service of the writ of garnishment was contempt at common law (and this was the ruling in Cole v. Hawkins, Andrews 275, and in some other cases) I doubt seriously whether it is a misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice..... These words seem to me to refer rather to riotous or unseemly conduct in the courtroom, or in such immediate proximity thereto as to interrupt the sessions of the court or the orderly conduct of business therein, and not to embrace constructive contempts of its authority." Here we find the geographical test being employed. The same test was used in Hillmon v. Mutual Life Insurance Co., 79 Fed. 749, and several other cases.

In In re Brule, 71 Fed. 943, an attempt was made to enlarge the scope of the meaning of the words "so near thereto." Brule bribed

one Joseph Langevin, a material witness for the United States Government, to avoid the service of a subpoena upon him and to conceal and hide himself to prevent the Government from using him as a witness. The act of bribing was done at the home of the witness, some distance from the court. Upon the contempt trial District Judge Howley said: "Now, from the reasoning of these cases it is made perfectly clear that the misbehavior of which Brule is guilty, if it had occurred anywhere within the building where the court is held, would have been clearly a contempt, punishable as provided in §725 of the Revised Statutes (Act of March 2, 1831, supra), by fine or imprisonment at the discretion of the court, and without indictment. Why? Because, under such circumstances it would have been misbehavior of a person in the presence of the court. But the statute says that the misbehavior of a person so near thereto as to obstruct the administration of justice may be likewise punished as a contempt of court. If it is a contempt to bribe a witness in fron of the courthouse door, is it not a contempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same? Is not the motive of the accused the same? What difference does it make whether the attempt was made on the ground owned by the United States or at the residence of the witness in the same town, four blocks, or about one-quarter of a mile away, from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other so near thereto as to obstruct the administration of justice, and the statute in clear language is made to apply to both cases." The judge here is coming close to applying the causal test, that is, the effect on the administration of justice, for, if he is logical what difference does it make if the same act is done one hundred miles from the court? The intent of the person and the result is the same. However much we agree with the logic of the decision Re Brule represents the minority view of the Federal courts.

In a review of this same case in the June, 1941, issue of the Albany Law Review, the author intimates that the interpretation of the statute had resulted in the use of the causal test. This is true only if the decisions in the later cases are considered, and those in the earlier cases -which were decided when the court had more clearly in their minds the purpose of the statute - completely disregarded.

The geographical test was finally discarded in the case of Toledo Newspaper Co v United States, 247 U.S. 402. Newspaper publications, concerning injunction proceedings pending in the District Court, were published by the newspaper company. The article created the impression that a particular decision would evoke public suspicion of the Judge's integrity or fairness and bring him into public odium and would be met by public resistance. The Toledo Newspaper Company and the editor were summarily convicted by the judge for contempt.

The judgment of the trial court was affirmed and certiorari was taken to the United States Supreme Court. Mr. Chief Justice White, speaking for the majority of the court upholding the power of the judge summarily to convict for contempt in this case, said:

"The provision (§268 of the Judicial Code, especially 'so near thereto' as to obstruct the administration of justice) therefore, conformably to the whole history of the Country, not minimizing the constitutional limitations nor restricting or qualifying the power granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation, that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly The test, therefore, is the character of the act done, and its direct tendency to prevent and obstruct the discharge of a judicial duty - a conclusion which necessarily sustains the view of the statute taken by the courts below....."

In a dissenting opinion, in which Mr. Justice Brandeis concurred, Mr. Justice Holmes said at page 423: "When it is considered how contrary it is to our practice and ways of thinking for the same person to be the accuser and the sole judge in the matter, which, if he be sensitive, may invoke strong personal feeling, I should expect the power to be limited by the necessities of the case 'to insure order and decorum in their presence' as stated in Ex parte Robinson, 19 Wall. 505." Again at page 425, Mr. Justice Holmes said: "I would go as far as any man in favor of the sharpest and most summary enforcement of order in the court and obedience to decrees, but when there is no need for immediate action contempts are like any other breach of law and should be dealt with as the law deals with other illegal acts. Action like the present in my opinion is wholly unwarranted by color of law."

It seems to the writer that the Chief Justice and his associates completely overlooked the history of §268 of the Judicial Code and the evil it was aimed at, namely, to prevent the summary punishment of contempts not committed in the court's presence or so near thereto as to obstruct justice. The majority opinion clearly uses the causal test to determine nearness to the court despite the historical background of the contempt section which would seem to indicate that a geographical test was the one to be used.

Certainly the contemptuous writings of Lawless, whose conviction by Judge Peck directly led to the Act of March 2, 1831, from which §268 of the Judicial Code is derived, was no less contemptuous than the writing which the Toledo Newspaper Company published. Yet, at the impeachment trial of Judge Peck, James Buchanan, who drafted the Act of 1832 said, "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr.Lawless has been its last victim." (Stansbury, Report of the Trial of James H. Peck, 1833). This would seem to indicate the intention of the drafter of the bill to limit the summary contempt power to those contempts committed in the court's presence or so near thereto, geographically speaking, as to obstruct justice and to leave those contempts which causally obstruct justice to be punished under §2 of the Act of March, 1831.

In the Nye case, Mr. Justice Stone wrote a dissenting opinion in which Mr. Justice Roberts and Mr. Chief Justice Hughes concurred.

Mr. Justice Stone said, "These contentions [contempts committed in the court's presence] assume that 'so near thereto' can only refer to geographical position and they ignore the entire import of the judicial history of the statute. 'Near' may connote proximity in causal relationship as well as proximity in space, and under this statute as the opinion seems to recognize even the proximity of the court, in space, of the contemptuous action is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances."

In construing the contempt section Mr. Justice Stone said: "Contempts which obstruct justice because of their effect on the good order and tranquility of the court must be in the presence of the court or geographically near enough to have that effect. Contempts which are surreptitious obstructions to justice, through tampering with witnesses, jurors and the like, may be proximately related to the condemned effect. We are pointed to no legislative history which militates against such a construction of the statute."

The writer fails to see how the minority can say they see no legislative history which militates against such a construction of the statute, in view of the history of §268 of the Judicial Code.

In Ex parte Robinson, 19 Wall. 505, the court said: "As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions and to enforce obedience to their lawful orders, judgments and processes."

Felix Frankfurter and James M. Landis, writing in the Harvard Law Review, Vol. 37, said, "The history of the times, the records of Congress, contemporary judicial construction, contemporary legal writings, the reflex of contemporary State legislation, a series of adjudications culminating in a Supreme Court decision, should, one would suppose, have foreclosed any other opinion but that the Act of 1831 was intended to, and did, limit drastically the authority of the inferior Federal Courts as theretofore exercised in the administration of the law of contempt."

To construe §268 of the Judicial Code as the minority in the Nye case would have us do would be, in effect, to emasculate §2 of the Act of March 2, 1831 (now §135 of the United States Criminal Code). If contempts committed in the court's presence and contempts which causally obstructed justice could be summarily punished it would leave few contempts which had to be punished by indictment and trial. This further militates against such a construction.

The minority opinion in the Nye case concluded, "In view of our earlier decisions and of the serious consequences to the administration of justice if courts are powerless to stop summarily, obstructions like the present, I think the responsibility of departing from the long accepted construction of this statute should be left to the legislative branch of the Government to which it rightfully belongs."

We agree that the courts by decision should not attempt legislation, but we do not agree that the majority opinion is guilty of this. Rather we feel that the minority is guilty of legislating judicially by giving the construction to the statute that it does. The Legislature in 1831 wrote a statute to cover the situation and for years a geographical construction was given to the words "so near thereto." Then the courts departed from this construction until the present decision in the Nye case.

The writer concludes that from a logical interpretation of the history of §268 of the Judicial Code and from a purely legal standpoint the majority decision of the court in the Nye case was a proper one and that the court rightfully overruled the Toledo case.

Some criticism has been directed at the difficulty of determining, geographically speaking, when contempts are commited "so near" to the court as to be capable of being punished summarily. The author sees no more difficulty in applying this test than in applying the test of reasonable care in negligence actions.

We now come to the question of policy. As Mr. Justice Stone says in the Nye case, at page 742, "The question is important, for if conduct such as this record discloses may not be dealt with summarily the only recourse of a Federal Court for the protection of the integrity of proceedings pending before it, from acts of corruption and intimidation outside the courtroom, is to await the indictment of the offenders, with or without adjournment of the pending proceedings as the exigencies of the case may require."

It seems that the courts should have the summary power to punish contempts which causally obstruct the administration of justice. The writer thinks that a good statute might be passed by Congress based on a sentence taken from the dissenting opinion of Mr. Justice Stone in the Nye case: "This court has hitherto, without a dissenting voice, regarded the phrase 'so near thereto' as connoting and including those contempts which are the proximate cause of the actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationship to the court."

This, in proper statutory form, would allow a combined causal-geographical test to be employed. Contumacious contempts could then be summarily punished, no matter where committed, and the court would not be faced with having to prosecute by indictment, to submit the issue to a criminal trial with all the attending hardships of obtaining a conviction.

JOHN FREDERICK REILLY

THE PEOPLE OF THE STATE OF NEW YORK ex rel. MARTIN PRISAMENT, v. JOSEPH H. BROPHY, as warden of Auburn State Prison (287 N.Y.132)

The primary question for the courts to determine in this case, was "What effect does a presidential pardon for a Federal offense have upon the power of a State Court to sentence a man as a second offender after convicting him of a State crime?"

The relator, Martin Prisament, was convicted of robbery in a United States District Court in 1937, and was sentenced to imprisonment for three years in an Ohio Federal reformatory. Almost two years later the Department of Justice discovered that some of its witnesses had been mistaken in their identification of Prisament as the offender, as was evidenced by later confession of one Slade who was really involved in the crime, and upon application to the President of the United States a full and unconditional pardon was granted Prisament on the ground of innocence.

About three months later, on March 11, 1940, Prisament committed a crime in this State. He pleaded guilty in New York County to the crime of attempted robbery, third degree. The District Attorney of that County filed an information pursuant to §1943 of the Penal Law, charging Prisament with the conviction for the crime for which he had been pardoned by President Roosevelt.

This information accused the relator in statutory form of having been previously convicted of a crime which would be a felony under the laws of the State of New York, if committed within this State. After having been duly informed as to his rights, the relator admitted that he was the same person mentioned in the information. He interposed, however, as a plea in bar to the increased punishment the "full and unconditional pardon." The court did not recognize this as a defense to the additional penalty, and the relator was thereupon sentenced to a term of not less than five nor more than ten years. Had he been a first offender, his term of imprisonment would have been for a maximum term of five years.

Prisament obtained a writ of habeas corpus before the Hon. Kennard Underwood, Cayuga County Judge, and submitted that he had not been allowed the right to plead the pardon in bar, and that therefore the sentence was void, as being a denial of due process of law. After a hearing the writ was dismissed.

An appeal was taken from this order to the Appellate Division, Fourth Department, and that court modified the order, Harris, J., dissenting, and remitted the matter to the Court of General Sessions of the County of New York, and further ordered that the relator be remanded for resentence as a first offender.

The Appellate Division proceeded on the theory that although ordinarily a pardon was an "act of grace" assuming the guilt of the defendant, and merely relieving him from the further legal conse-

quences of his crime, and as such it could not blot out the fact of guilt nor the record of conviction, nevertheless the underlying principle is different if the pardon is granted upon the ground of innocence. (People ex rel. Prisament v Brophy, 261 App. Div. 495, at page 496.) In writing the majority opinion of the Court, McCurn, J., said, "The theory upon which increased punishment is provided for in §1941 of the Penal Law is that the defendant since his first offense has not reformed but has persisted in breaking the law, thereby showing such evil tendencies as to justify a more severe penalty than would be inflicted upon a first offender. (People v. Bergman, 176 App. Div. 318, appeal dismissed 220 N.Y. 704; People v. Raymond, 96 id 38, affg 32 Hun 123.)"

The court found some authority for supporting its distinction drawn between a pardon granted upon the ground of innocence and the ordinary manifestation of executive clemency: "The distinction is recognized by the United States Circuit Court of Appeals in Groseclose v. Plummer (106 Fed 2d 311, certiorari denied 308 U.S. 614). The court said (at page 313), 'A pardon, to the extent of its terms, does nothing more than abolish all restrictions upon the liberty of the pardoned one, and upon his civil rights that follow a felony conviction and sentence. As to what effect a pardon would have based upon the discovery of absolute innocence of crime we need not here consider, for the text of each pardon in this case assumes the guilt of the petitioner.' (See also, People v. Dutton, 9 Cal. 2d 505, 71 Pac 2d 218, appeal dismissed 302 U.S. 656; 88 U. of Pa. Law Review 647; 78 id. 561; 41 Harvard Law Review 918; 14 Minn. Law Review 293. Cf. Williston, 'Does a Pardon Blot Out Guilt', 28 Harvard Law Review 647; and annotation 116 A.L.R. 209.)"

Seeking a solution for the obvious hardships worked upon the prisoner, the majority of the court found some syllogistic justification for their belief that the President's pardon is to be given more effect when based upon the innocence of the prisoner. They adopted the premise that the power to pardon is constitutional. They then drew the conclusion that the power to make a finding that the defendant was innocent of the crime is constitutional, being implicit in the power to grant a pardon on the ground of innocence.

Justice McCurn, writing for the court, cited §729 of Title 18 of the United States Code to show that Congress has recognized the President's power to make a finding of innocence. This section allows an individual who has been pardoned on the ground of innocence to bring suit in the Court of Claims to recover damages for such conviction and imprisonment.

Here it may be pertinent to mention that the deductive reasoning above mentioned was not specifically challenged by Judge Lehman in his opinion for the court in the Court of Appeals, but was generally rebutted by a distinction made therein. "Congress has seen fit to provide that in an action which an innocent person may maintain for damages sustained by an erroneous conviction and imprisonment thereunder, a presidential pardon which contains a finding that the person convicted 'did not commit any of the acts with which he is charged' shall have the same effect as a judicial finding, made on appeal or upon a new trial or rehearing, that the convicted person

is not guilty. It has not seen fit to provide that for any other purposes a presidential pardon shall have the same effect."

The President's finding may be sufficient to allow monetary reparation for a moral wrong committed by the United States against the prisoner if he believed one had been committed, without being powerful enough completely to eradicate a record of conviction which can be neither inscribed nor obliterated except by and through solemn judicial process.

The Appellate Division reached the final conclusion that "The pardon in the instant case is a bar to increased punishment and the defendant should have been sentenced as a first offender." Harris, J., dissenting, called to mind the three separate branches of the Government and held that the finding of the majority led to the invasion by the executive of the duties and powers of the judiciary. In his opinion the relator should have sought remedial legislation or clemency by the Governor. He mentioned a third alternative, application to the court in which the first conviction was had, for a setting aside. This remedy is not now open to the prisoner because of the element of time. Prisament was remanded for resentence as a first offender.

In granting leave to appeal to the Court of Appeals, the Appellate Division certified the question: "WAS THE RELATOR LEGALLY SENTENCED AS A SECOND OFFENDER?"

The appeal came on, was heard, and decided against the relator. Judge Lehman, writing, cited United States v. Wilson, 7 Pet. 150, for his definition of a pardon. There it was defined as "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual upon whom it is bestowed, from the punishment which the law inflicts for whose benefit it is intended."

The Chief Justice went on to explain from the definition, and in accordance with it, that a pardon exempts a person who has received and accepted it from further punishment for the crime whether or not the pardon wiped out the judicial finding of guilt. He argued that "increased punishment is not further punishment for the prior offense" and cited McDonald v Massachusetts, 180 U.S. 311, which said "the punishment is for the new crime only but is the heavier if he i an habitual criminal." This he substantiated further by People v. Carlesi, 154 App. Div. 481, opinion by Miller, J., affd 208 N.Y.547, affd 233 U.S. 51. Therein Justice Miller quoted the Legislature of this State and said that "one who commits a crime after having been convicted of another crime is a greater offender than as though he had not previously been convicted, and the punishment inflicted is solely for the second offense to which a greater degree of criminali ty is thus attached." The court does not re-examine the first case to determine the question of guilt. It takes cognizance of the former judicial finding, and in such manner determines the criminality of the second offense by using the former record merely as an elemen in its deliberations.

The old judicial decisions and commentaries which promulgated the theory of a complete erasure of guilt were noted. (Professor

Williston's article, "Does a Pardon Blot out Guilt?", 28 Harvard Law Review 657; United States v. Wilson, supra; Ex parte Garland, 4 Wall. 333.)

The last case cited above was recognized as a leading authority on the subject. There the metaphor "blot out of existence the guilt" was used, but the Court of Appeals minimized the effect that was to be given to this figure of speech by explaining that the words were not intended to mean that which they naturally connoted, but were the product of strenuous Civil War times, and, further, a bare majority of the court concurred in that decision. The court then cited Burdick v. United States, 236 U.S. 79, to show that "far from wiping out guilt, the acceptance of an executive pardon may imply a confession of guilt." There, a man refused to testify on constitutional grounds, was offered a pardon as an incentive to "talk" but would not accept it. The United States Supreme Court, in holding that the individual had a right to refuse, stated that such acceptance might have brought greater disgrace upon him. (United States v. Burdick, supra, at pp. 90, 91.)

The Court of Appeals admitted that the Legislature and Congress were powerless to limit the constitutional power of the President to exempt an offender from punishment for his offense, but allowed that "****the State may still provide that in fixing the penalty for an offense against the sovereign State, the offender's past conduct, including the commission of an offense against another sovereign, may be taken into account even though the offender has been pardoned by such other sovereign.***"

The court recognized contrary views held in other States. (State v. Lee, 171 La. 744; Scriviner v. State, 113 Tex. Cr. Rep. 194; Edwards v. Commonwealth, 78 Va. 39; Kelley v. State, 204 Ind. 612; State v. Martin, 59 Ohio St. 212.) It might have added People ex rel. Forsyth v. Court of Sessions, 141 N.Y. 288, 295; Knote v. U.S. 95 U.S. 149; and U.S. v. Klein, 13 Wall. 128; Armour Hunt, Ex parte 10 Ark. 284; and Bishop on New Criminal Law Vol. 1 §919.

Nevertheless, all the judges concurred in Chief Judge Lehman's statement, "Absolution by temporal authority for an offense implies, perhaps, that there is reason to believe that rigid enforcement of the usual penalty for the offense would work injustice. It ordinarily implies nothing more and where the offender sins again he is properly subject to additional punishment." Their precedents were People v. Carlesi, supra; People ex rel. Jobissy v. Murphy, 244 App. Div. 834, affd 268 N.Y. 695; People v. Biggs, 9 Cal. 2d 508, 71 Pac. 2d. 214; Mount v. Commonwealth, 2 Duv. (Ky.) 93; Herndon v. Commonwealth, 105 Ky. 197; State v. Edelstein, 146 Wash. 221; Commonwealth ex rel. v. Smith, 324 Penn. St. 73; State v. Webb, 36 N.D. 235; Williston, "Does a Pardon Blot out Guilt?" supra, at p. 659; 2 Wharton Criminal Procedure (2d ed.) §1471.

Then, rebutting again the argument that the rule might be different where the pardon recites that it was granted because it was established to the satisfaction of the executive that the one charged with the crime was innocent, the court rejected the assumption upon which the argument is based. The assumption classified as false reads: Since the executive has made a finding of innocence, the

judgment of conviction, which would otherwise be conclusive, no longer establishes guilt. Chief Judge Lehman said that a plea of "inconclusive evidence" seeking a finding by the executive of an unjust conviction is no weaker than a plea of innocence. Yet "the judgment of guilt is, as matter of law, conclusive upon the executive as well as upon all others except where a statute provides otherwise."

The court called attention to the inflexible rules of procedure which prevent a man from presenting proof whenever it becomes available and conceived an ideal administration of justice which would overcome these difficulties. The Chief Judge suggested, "Perhaps the chief executive should have power to set aside a finding of guilt, at least where the courts are powerless." and concluded for the Court: "***that a presidential pardon, even if granted because the President is satisfied that the convicted person is innocent, is an act of grace which does not obliterate the finding of guilt. Any inflexible rule or standard of punishment prescribed by statute will inevitably work injustice in particular cases. The remedy in such cases lies with the executive of the State, not the court."

The order of the Appellate Division was reversed and that of Special Term dismissing the writ of habeas corpus affirmed. The question certified was answered in the affirmative. Loughran, Finch, Rippey, Lewis, Conway, and Desmond, JJ., concurred with the Chief Justice.

With reference to its procedural restrictions, an examination of the rule laid down in this case might lead one to inquire as to the sufficiency and justice of laws which will allow an apparently innocent man to be classed as a felon for the purposes of additional punishment for a new crime. An answer, if answer there be, might be evolved from a consideration of the system of jurisprudence under which we, in this country, conduct ourselves. Roman Law might have offered a solution to the relator's difficulties here. But we are bound, and for our own benefit, by other considerations than those dictates of justice which might be found applicable to some situations, but which might also sway and be lost to some comparable set of facts. We should find more comfort in a carefully thought out system of administering justice which provides an inexorable rule, than one which might vacillate with the favor of some dignitary.

Our law is not entirely unbending. Admittedly it can be improved yet even in the relator's difficult position two further remedies are provided, i.e., remedial legislation and appeal to executive clemency within the State. There is an apparent conflict with reason in the statement of the courts that the aggravated punishment meted out upon conviction of a second crime is not additional punishment for the first. The observer recognizes two principles:

1. A past offender who renews his criminal habits by clashing with the judicial codes a second time should receive a harsher penalty than one who has for the first time transgressed the law.
2. No matter how jurists may word the system which inflicts the increased punishment, whether by saying that the fact of the former

conviction is "an element merely in determining the criminality of the second offense", or, is "an element of the criminality itself", or, is "taken into consideration in determining the guilt of the individual for the second offense", still, the man is receiving punishment because of his past offense.

And, if he is receiving punishment because of the former offense, it isshould be logical to be able to word it "for his past offense." In regard to the second enumerated principle, however, the courts of the several States are almost unanimous in reaching the opposite conclusion. A thorough digest of the cases so holding may be found in the annotations at 58 A.L.R. 20; 82 Id. 345; 116 Id. 211; and 132 Id. 91.

In these all-inclusive compilations of cases the second-offender rules are tested against every constitutional right reserved to citizens. They have been held to be neither ex post facto laws nor unjust discriminations; they do not impose penalties out of proportion to the nature of the offense; nor are they a denial of due process or equal protection of the laws. In these cases also, double jeopardy has been found to be no defense to increased punishment inflicted under second-offender laws. In the face of such a host of authorities, discussion becomes academic.

If the observer, however, is willing to withdraw his second finding, recognizing that public necessity demands an execution of the first principle, he may yet have doubts as to the application of another rule held by a number of courts which is apparently inconsistent with the holding made herein. This rule provides in substance that "the effect of a pardon is to relieve the petitioner from all legal penalties and disabilities arising from the offense."

Perhaps these doubts may be cleared by a reference to later decisions which seem to restrict the release to all proximate immediate penalties which the law provides for the crime. In effect, the courts are unwilling to allow the Executive to make a new man out of a convicted felon unless specific legislative authority is given for such action.

JAMES TRACEY TAAFFE, JR.

KYFF v. KYFF, 286 N.Y. 71

LUMP SUM SETTLEMENT FOR SUPPORT NOT A BAR TO ALIMONY

The Court of Appeals recently handed down a decision in this case in which they held that a previous lump sum settlement in a voluntary separation agreement is not a bar to alimony, in a subsequent action for divorce brought by the wife.

While the particular point in question is new, the question of the authority of the Court to set aside or disregard a former lump sum separation settlement has presented many perplexing controversies. It has been uniformly held that under Dom. Rel. Law §51 the husband is under a legal obligation to support the wife. Thus a contract whereby the husband agreed to pay the wife a certain sum in monthly installments, in lieu of support, has been held invalid. (Garlock v. Garlock, 279 N.Y. 337.) In some cases, however, where the parties entered into a separation agreement, a contract by the husband whereby he paid his wife a certain sum in consideration of which she released him of all liability for her support has been upheld. The test applied by the courts in these cases where the validity of such contract was called into question is whether or not the agreement is just, fair, and adequate, in the light of the husband's means and the wife's circumstances. (Tirrell v. Tirrell, 232 N.Y. 224; Vallee v. Vallee, 154 Misc. 620.) The general trend of authority has been, however, that if the agreement was fair, adequate, and just, the court would not increase or reduce the amount of the stipulated payments because of a change of circumstances. (Stoddard v. Stoddard, 191 App. Div. 136.) This rule was not inflexible in operation, and in Harding v. Harding, 203 App.Div. 721, affd 236 N.Y. 514, the possibility of an opposite result was anticipated. That case was an action to set aside a separation agreement, the wife contending that at the time the agreement was entered into she was in such a condition that she was unable to judge wisely. The question arose as to the relevancy of examining the husband as to his income in years subsequent to the separation agreement, he contending that his income only at the time of the agreement was relevant. The court in deciding that his subsequent earnings were the proper subject of the examination, stated "Can it be said that the defendant's obligation to support his wife changed? We do not think so. His obligation to support his wife is a continuing one so long as the relation exists." (Harding v. Harding, supra.

In the case of Kyff v. Kyff, under discussion here, the action was for divorce brought by the wife. The judgment of the Supreme Court in her favor was modified by the Appellate Division by striking out the provision for support, on the ground that the award of alimony was barred by a separation agreement between the parties. Upon this appeal the sole question presented was whether the existence of the separation agreement should have precluded an award of alimony under the circumstance of the case. In 1930, during the pendency of a separation action, the parties entered into an agreement whereby the wife released certain property interests, and gave to the husband the sole custody of the three children of the mar-

riage. The agreement provided that the husband should pay the wife the sum of $3,000 in consideration of her release of him for all liability for her support and maintenance of every kind. The money was paid by the husband as agreed and the separation action was abandoned. After ten years the wife commenced the present action for divorce. At the trial it was established without contradiction that the wife had expended the $3,000 in the course of the ten years, and that her sole source of income consisted of a salary of $10 per week which she earned as a waitress. It was also shown that the husband's income was about $50 per week. Upon these facts the Supreme Court required the husband to contribute $7 per week to the wife. The position taken by the husband was not that the allowance was improper in amount, but that under the terms of the separation agreement of ten years before, he was forever relieved of the duty of support,and that it does notappear that the $3,000 paid for the release was not a generous settlement, and one which fully compensated the plaintiff. The Court of Appeals in deciding this case stated the rule which has been stated in the case of Tirrell v. Tirrell, supra, and like cases, to the effect that where the husband and the wife agree upon the measure of the support which they deem adequate for the wife, the court will not compel the husband to support the wife in a greater sum unless the amount agreed upon is plainly inadequate. The Court then said "Clearly this is not an agreement whereby the husband and the wife have mutually agreed upon a scale on which the husband will support the wife. On the contrary it is an attempt by the husband to purchase exemption from his continuing duty by the terms of an agreement which are expressly forbidden by §51 D.R.L. There is evidence in the record, not contradicted, sufficient to show the needs of the plaintiff, and the ability of the husband to contribute the modest sum he has been directed to pay. To relieve him of that obligation is to release him from an obligation which is sustained by the authorities."

In order to arrive at the position that the court has authority to award alimony in this case, the court relies on C.P.A. §§1155, 1170, which direct the court to make such provision for the wife as justice may require. In Goldman v. Goldman, 282 N.Y.296, the authority of the court under these provisions was discussed. A prior separation agreement had been incorporated in the final decree in a divorce action, in 1929. In 1938 the court modified the final judgment by reducing the amount which the husband was required to pay, from $21,000 to $14,000 per year. The Plaintiff, appellant, relying on the cases of Galusha v Galusha, 116 N.Y. 635, 138 N.Y. 272, urged that the provisions of the separation agreement incorporated in the divorce decree, pursuant to a valid agreement between the parties, be not changed or modified without the consent of both parties. The Court decided that C.P.A. §§1155, 1170 conferred upon the court power to fix the amount which the husband should pay for the support of his wife and children, but that it did not mean that the judgment had to be for the entire amount of the separation agreement. The judgment itself could be modified by the court for there is an implied condition in each such judgment that it is subject to modification by the court, but the contractual rights of the parties are not changed by such modification, and the parties may enforce such rights as they have under the contract. The Galusha case, referred to in the Goldman and in the Kyff cases, was an action for divorce. There had been a former separation agree-

ment and the decree of divorce awarded the plaintiff in addition $3,750 per year. On appeal the General Term reduced this amount to $3,000, and terminated the separation agreement. The Court of Appeals held that the separation agreement was not affected by the decree of divorce. If adequate it would stand unless both parties consented to terminate it. "There are a number of cases where, notwithstanding a voluntary separation agreement, the court has made an additional allowance upon the ground that the settlement was inadequate for her support, citing Bishop on Marriage and Divorce, and cases therein cited." (Galusha v. Galusha, 116 N.Y. 635). In subsequent litigation between the same parties, in an action initiated by the plaintiff to rescind and cancel the separation agreement, the Court said that its decision in the divorce action was conclusive authority for the proposition that as long as the agreement remains unimpeached it must be the measure of the allowance for the support of the wife. (Galusha v. Galusha, 138 N.Y. 272.)

Notwithstanding these cases, and particularly the Galusha case, the Court, in the Kyff case, reaches its conclusion by the assumption that "this is clearly not an agreement whereby the husband and wife have mutually greed upon the scale on which the husband shall support the wife." (Kyff v. Kyff, supra, p. 74.) Factually we may not be able to distinguish the agreement from that in many of the cases which have upheld the agreement and held that having been fairly entered into, and just and adequate in the light of the husband's means and the wife's circumstances, the Court would not alter it because of changed circumstances. Should the fact that the alteration is sought in an action for divorce, where by statute the Court is allowed to make such provision for the support of the wife as justice requires, alter the settled rule? The controlling factor, in my mind, and that which is apparently the moving force in the Kyff case, is the interest of the State in seeing that no person becomes a public charge. The Court in its opinion says, "The record in the case at bar clearly establishes the need of the plaintiff wife, and indeed it is uncontradicted by the husband except insofar as he invokes the separation agreement and the release contained therein. We must always have in mind the interest of the State in the marriage to see that the wife and the children shall not be left in the community without adequate support, and every agreement between husband and wife must be viewed in the light of this continuing interest of the State." (Id, p. 74)

The same theory was discussed in Harding v. Harding, supra. While the idea that society is protected from the wife's becoming a public charge may have many arguments in its favor, the opportunities for oppression must be remembered. There is no reason why a wife should receive a settlement fair and adequate at the time the agreement is entered into, and then when she has squandered all that allowance, secure further support by obtaining a divorce. This case is no authority for the proposition that in every instance the wife can receive additional support after a lump sum settlement. Nothing contained in the decision can be interpreted to hold that if an agreement is fair and just when entered into and is acknowledged by the parties at the time to be -as the Court puts

it - "the scale upon which the husband shall support the wife", it will not prevent the award of alimony. We must remember, however, that the Court has a broad discretion under C.P.A. §§1155 and 1170, and in any case where justice requires that the wife receive further support the Court may grant such alimony. While the statutory provision is broad, we must assume that the courts will dispense justice wisely and that only those wives whose present state of need cannot be attributed to fraud or folly on their part will be considered as meriting the additional allowance.

ARTHUR J. PRINDLE

THE KRAUSE CASE - NO COMFORT

A recent case in the Advance Sheet, Cross v. Cross, 177 Misc. 347, marked an attempt to apply the species of estoppel recognized in Krause v. Krause, 282 N.Y. 355, to a case involving an interlocutory decree of divorce of a Massachusetts court which had not yet become final. Before going into the facts of the Cross case, it might be well to review briefly several decisions in which this doctrine of estoppel was followed and applied by our courts.

In Starbuck v. Starbuck, 173 N.Y. 503, regarded as the leading case, the wife of a deceased husband claimed dower rights in his estate. The defendant put in evidence the record of a foreign decree of divorce which the plaintiff had obtained from the husband on the ground of his extreme cruelty. The husband did not appear in the action nor did he submit himself to the jurisdiction of the foreign court. In New York, as we know, adultery is the only ground for an absolute divorce. (People v. Baker, 76 N.Y. 78.) Nevertheless, even though the ground for the divorce was not sufficient under our law and would not be recognized as binding by our courts, the divorce obtained by the wife was admitted in the action for the purpose of defeating her claim to dower. In its opinion the court stated that the plaintiff, having submitted herself to the jurisdiction of the foreign court, could not now be heard to question the validity of its decree. She was estopped from raising the question of the invalidity of the foreign decree of divorce.

This decision was followed in Brown v. Brown, 242 App.Div. 33. There the action was based upon a contract which was dependent upon a marriage between the plaintiff and the defendant. The defendant attempted to impugn the validity of this marriage by proof that a judgment of divorce previously obtained by himself in the courts of a sister State was invalid for lack of jurisdiction and since his former wife was then living he was incapable of entering into a valid marriage with the plaintiff. The court, however, held that the defendant could not be heard to impeach the decree of divorce which he had procured to be entered in his own favor. He was estopped from raising the invalidity of the foreign decree.

It was also followed in Hynes v. Title Guaranty & Trust Co., 273 N.Y. 612. The action was brought to establish and admeasure plaintiff's dower in the estate of her former husband. An affirmative defense of the defendant executor alleged that the decedent had previously been married and had obtained a divorce in France upon grounds not recognized as sufficient for divorce under the laws of New York and, since she was alive at the time the plaintiff married the decedent, the marriage with the plaintiff was a nullity. The court struck out this defence on the ground that the decedent would have been estopped from attacking the validity of the French divorce and that therefore the executor was also estopped.

In all the above cases this doctrine of estoppel was recognized and applied when private rights, which were collateral to the marriage itself, were at stake, i.e., in the Starbuck and the Hynes cases, the adjudging of dower, and in the Brown case, the ful-

filling of the contract. In the Cross case, however, the plaintiff was not seeking an adjudication merely of private rights collateral to the marriage but was seeking an adjudication upon the marriage status itself. The wife sought a separation upon the ground of abandonment and desertion. She made a motion for temporary alimony and counsel fees. The defendant sought to defeat this motion upon the ground that his marriage to the plaintiff was invalid because he was legally incompetent at the time to contract another marriage, and therefore the plaintiff could not show the necessary probability of success upon the trial of the action to warrant an award of temporary alimony and counsel fees. It appeared that an interlocutory decree of divorce had been obtained against the defendant in Massachusetts, and that the defendant had married the plaintiff in New York State more than a month before the Massachusetts decree of divorce became final.

The question in the case was, whether the defendant could take advantage of the defense that the courts of Massachusetts had not freed him from the bonds of his first marriage, although in contracting a marriage with the plaintiff thereafter he chose to act as though the legal restraints had been lifted and he were free. Previous to Krause v. Krause, the doctrine of estoppel was excluded by the courts from those situations where an adjudication was sought only on the marriage status itself, since the State, as well as the parties to the marriage, has a direct interest therein, but as the court pointed out in Maloney v. Maloney, 22 N.Y.Supp. (2d) 334, affd 262 App. Div. 936, the Krause case marked a departure from this rule.

In Krause v. Krause the defendant husband had previously been married in New York. Subsequently he made a visit to Reno, Nevada, where he obtained a decree of divorce from his then wife. She did not make an appearance in that action, nor was she personally served. Thereafter the defendant married the plaintiff and, after a few years, abandoned her. She then brought the action for a separation and for support. To avoid liability for this support the husband alleged the invalidity of the Nevada decree of divorce which he had obtained from his wife Number 1 and which therefore made the marriage with the plaintiff void. The court, however, held that he was precluded from setting up the invalidity of the divorce so obtained and decided that it was not open to the defendant in those proceedings to avoid the responsibilities to the plaintiff which he voluntarily incurred.

It can be seen that the Cross and the Krause cases are not on all-fours with each other, but the argument arises that very few cases decided by the courts are, and we do not wonder that the attorney for the plaintiff in the Cross case looked to the Krause case for comfort. In each there was a decree of divorce, invalid in law, but upon the basis of which the defendant had chosen to consider himself free and to undertake the responsibilities of a new marriage. In the Krause case, while the foreign divorce was, under our law, invalid, the court held that the defendant was estopped from raising its invalidity as a defense in that action inasmuch as he had acted as though it were valid and had contracted the marriage with the plaintiff and its accompanying responsibilities.

Therefore, it would not be unreasonable to expect the court in the Cross case to hold that even though the divorce obtained in Massa

chusetts was not yet final, the defendant was denied the right to raise that fact in that action as a defense inasmuch as he had chosen to recognize its finality and had entered into the marriage with the plaintiff. Actually, however, the court in the Cross case stated, "The new ground broken by the Court of Appeals in the Krause decision does not, in my judgment, reach to the facts of the present case." In so holding, the court relied upon the fact that it lacked the affirmative element contained in the Krause case. That is to say, in the Krause case the defendant sought and obtained the foreign decree of divorce, while in the Cross case the defendant did not seek the divorce in the courts of Massachusetts.

Perhaps this is a valid distinction as undoubtedly the court in deciding the Krause case did rely upon the fact that the defendant himself brought the divorce action in the foreign court, and perhaps before the courts could apply the doctrine of estoppel in situations exactly likethat of the Krause case, it should be necessary that the defendant be the one procuring the foreign decree of divorce.

However, in a situation like that found in the Cross case, the question as to who brought the foreign divorce, which had not become final before the defendant undertook the second marriage, would appear to be entirely immaterial if the defendant submitted himself to the jurisdiction of the foreign court in that action. In such a case I should like to see the defendant held responsible for the support of the plaintiff, and I am of the opinion that it would not be extending the decision of the Krause case too far to hold that the fact of the defendant's submitting himself to the jurisdiction of the Massachusetts court, and then chosing to act as though the legal restraints had been lifted, is the most important element to be considered, and sufficient in itself to estop the defendant from raising the defense that the interlocutory decree was not final when he contracted the marriage with the plaintiff.

The decision in the Cross case, however, would seem to indicate that the courts are not sure just how far they should go in invoking the doctrine of estoppel as stated in the Krause case and are waiting for the Court of Appeals to venture beyond that decision and to mark out the arena in which it should be applied.

FRANK P. MYERS, JR.

TESTAMENTARY GIFTS RESTRAINING MARRIAGE

In May, 1941, the Surrogate of Kings County handed down his decision in the case entitled Matter of Dettmer, 176 Misc. 512. At first glance it seemed that the case was simply another dealing with the established principle that a testator cannot attach to a gift, given by his will, a condition generally restraining the donee from marriage - a violation of which condition automatically forfeits the gift. However, upon reading the contention of the party attempting to have the gift declared forfeited this writer realized that, although the principle of law may be well settled, there might be great difficulty in applying that principle to a given set of facts. For a complete analysis of the case it will be beneficial to discuss it in the light of adjudicated cases which have been held to be the law of New York State.

Matter of Dettmer is a proceeding for the construction of a will. It was brought before the Court by the petition of the National City Bank of New York, as executor of the estate of the deceased sister of the testator. The will of Julius G. Dettmer provided as follows: "SECOND. I give, devise and bequeath unto my friend Mrs. Mary Vogelsang***all of the property, real and personal, of every nature whatsoever and wheresoever situate, of which I may die seized or possessed, absolutely and forever, upon condition that she shall not remarry. THIRD. In the event that said Mrs Vogelsang shall remarry the provisions of Paragraph Second hereof shall be null and void and the property thereby devised and bequeathed shall revert to my estate and be distributed and disposed of as if I had died intestate."

The Surrogate found that the indicated beneficiary was married in 1904, when approximately 16 years of age. Her husband died in 1909. In the same year she met the present tastator, who was about 31 years of age and unmarried, and a strong friendship was formed between them, which continued to the time of his death. He never married. To his knowledge she had limited means, and subsequent to his father's death in 1934 he made frequent monetary gifts to her. The testator was never gainfully employed and until his father's demise he appears to have subsisted on an allowance from the latter, Thereafter he received an income from a trust erected by his father' will. His gross estate amounts to a little over $110,000.

The present opponents on this construction proceeding are Mrs. Mary Vogelsang, and the estate of the testator's sister. The former, the donee, contends that the condition against her remarriage as set forth in the will is void, and that she is entitled to the gift freed from its limitation. The estate of the sister contends that the condition is valid, and that if the donee remarries her gift will be forfeited and the corpus of the testator's estate will "revert" to it, since at the time of his death in July, 1940, she was his sole statutory distributee. In support of this contention, the estate of the sister claims that the provision in the will merely limits the duration of the donee's estate to the period of celibacy, and does not void the estate on marriage of the donee, and is therefore valid. Her estate also claims that even though the provision of the will be held to be one of forfeiture upon marriage,

it is not invalid because it applies to a remarriage and not to an original marriage.

The Surrogate commences his opinion by stating that the "well established and familiar principle of the law of wills that a testamentary gift imposing a general restraint upon the marriage of the beneficiary is void." In support of this statement he cites Matter of Seaman, 218 N.Y. 77, and Matter of Liberman, 279 N.Y. 458. In the former case, under the will of the testator, his daughter could not receive the testamentary gift as long as one Mr. Fassler remained alive; unless at the time of the testator's death she was married to someone other than Mr. Fassler, - the provision obviously designed to prevent the marriage of the testator's daughter to the particular individual named in the will. The court held that conditions in general restraint of marriage were regarded at common law as contrary to public policy and therefore void, but that the common law never prohibited conditions in restraint of marriage between particular classes of persons or between specific persons. The Court cited with approval 2 Jarman on Wills (6th Ed.) p. 47: "Conditions not to marry a Papist, or a Scotchman; not to marry any but a Jew****have also been held good." The condition in Mr. Seaman's will was held to be valid.

In Matter of Liberman the testator was an orthodox Jew. His son Harry had married twice, neither of his wives being of his faith The testator had strongly disapproved. Though he bequeathed to Harry and his issue beneficial interests in the residuary estate, he provided that the enjoyment of such beneficial interests should be contingent upon the marriage of Harry with the consent and approval of the executors and trustees named in the will. Harry brought the action to compel his brother and sister, as executors and trustees, to consent to his marriage to Margaret Jones. As the Court there held, this condition obviously was intended to restrain Harry from marrying any but a Jewess. The Court said, citing Matter of Seaman "that a condition calculated to induce a beneficiary to marry, even to marry in a manner desired by the testator, is not against public policy. A condition calculated to induce a beneficiary to live in celibacy or adultry is against public policy, and therefore void." However, the beneficiary had to have the consent of the executors and trustees, who under the will of the testator would profit by refusal of consent, and there was nothing in the language of the will which could be construed as a limitation upon this power to give or withhold this consent in the exercise of an unfettered discretion." For this latter reason the Court held that the restraining condition in the will was invalid, because considering it "in its complete setting it becomes evident that the intention of the testator, as expressed in his will, was not merely to prevent the beneficiary from marrying any person than a Jewess or even from entering into an ill advised marriage, but to prevent any marriage not approved by the very persons why by approval would lose the benefit of a legacy they might otherwise keep. Both reason and authority dictate the conclusion that such a condition is invalid. Its natural tendency might be to induce the beneficiary to live in either celibacy or adultery."

The Surrogate next cites Matter of Hughes, 225 A.D. 29 (aff'd, without opinion, 251 N.Y. 529). He prefaces this citation with, "It will be of advantage to consider the decisions which have distin-

guished between conditions voiding estates on marriage of the donee and directions limiting their duration to the period of celibacy." In the Hughes case the will gave the life use of the entire estate to a married woman who was separated from her husband, further providing that if she returned to him she should receive nothing and the estate should devolve to the children of the testator's nephew. The Court held this direction to be valid. "An inference that one is moved by an improper or unlawful motive should never be drawn when a legitimate purpose is just as apparent!" In this case the Court held that it was logical to conclude that the testator wanted to provide for the beneficiary of his bounty only in the event that she continued to live alone and was deprived of the benefit and support of the wage earner of the family, and that the direction need not necessarily mean that the testator had an unlawful purpose to keep the beneficiary and her husband apart. Similar results were attained in Irwin v. Irwin, 179 App. Div. 871, and in Matter of Horton, 160 Misc. 64, and in several out-of-State cases.

Thus we have the law of New York State as recited in the decisions of the courts. Now comes the all-important application of these holdings to the facts presented in the Dettmer case. The following holding is that of the Surrogate, and the reasons given are those offered by him in declaring the directions in the will of Julius Dettmer a condition and not a limitation. He admits that although the distinction between a limitation and an absolute condition is clear, the practical application of it is at times fraught with no little uncertainty. "As the Court reads the decisions which have construed as mere limitation language which to other minds or in other situations might well have been deemed conditions, there has in each instance been a demonstration of a positive wish to benefit an identified alternate donee which was incapable of initial accomplishment by reason of the superior immediate needs of the primary donee and the insufficiency of available assets in excess of his or her requirements. This element is here absent. The clause as written is one of pure forfeiture**** The present is not the variety of situation in which such equities are present as should induce a court to find a reason or pretext for an attempt to circumvent the usually applicable rule."

So reasons the Court in overruling the first contention of the petitioner. Undoubtedly there are those who will dispute such holding. It is indeed one of the close cases. The decision accomplishes precisely what the testator wished to prevent. His express wish is ignored. The Court has found that to the testator's knowledge Mrs. Mary Vogelsang had limited means and that subsequent to his father's death he had made frequent monetary gifts to her. It would seem that these facts could reasonably give rise to an inference that Dettmer's intent was to provide for Mrs. Vogelsang until she remarried, until she had someone else to support her. In reality there is an alternate beneficiary though she be not individually identified. She is the testator's sister, who was his sole statutory distributee at his death. Of course, to hold as suggested involves more conjecture than does the holding of the Court. It will seem to some a harsh rule that allows an outsider to hold against the family of the testator, when the outsider may ignore the condition upon which the gift was given.

The second contention of the petitioner is likewise an interesting one. The executor of the sister's estate claims that even though the direction in the will be held to be a condition, it is valid because it is a prohibition against remarriage, not a prohibition against an original marriage. The basis for this claim is found in the early law of England. In Newton v. Marsden, 2 J. & H. 356, the court held that "although a condition directly contrary to marriage annexed to a legacy in a will is a void condition, yet the civil or rather the canon law both distinguish in this point between a virgin and a widow and says that such conditions against marriage (as to a virgin) are void, but allows them as to widows, specially if the legacy be given by a husband to his own wife or by a son to his mother." Vice-Chancellor Wood went the whole distance and declared that there was no authority in the common law for holding void a condition restraining the marriage of a widow. He thereupon upheld a condition against remarriage imposed on a gift by an uncle to a niece. In Allen v. Jackson, 1 L.R. [Ch. D. 1875-1876]399, and in Bostick v. Blader, 59 Md. 231, this doctrine was applied to a condition upon a gift to a husband under his wife's will.

The court in the Dettmer case held that this contention of petitioner was untenable. The first basis for so holding was the following sentence in Matter of Liberman, supra: "A condition calculated to induce a beneficiary to live in celibacy or adultery is against public policy." The Surrogate held that logically this quotation was equally applicable to all unmarried persons irrespective of whether or not they have previously been married. He then cited People v. Olmstead, 27 Barb. 9 "The whole frame of government and laws has been said to exist only to protect and support the family, so that it may develop and perfect the character of its members." The court then said that it was obviously the policy of the State to promote the formation of families, which implies the uniting in matrimony of unmarried men and women, and that a person whose previous marriage had been terminated is as fully embraced within this policy as one who has never been joined in this.

There can be no dispute with such holding. Where the policy of the State is concerned the courts should uphold that policy. The law of New York is that conditions in general restraint of marriage are invalid, and such law is reasonably and logically applied to cases involving remarriage.

It follows then that the beneficiary, Mrs. Vogelsang, takes under the will as if no condition had been annexed to the gift. She receives an unqualified gift of all the real and personal property of Mr. Dettmer, absolutely and forever.

JAY COX O'BRIEN

PEOPLE v. COX, 286 N.Y. 187

In this decision the Court of Appeals decided a question which had not previously come before our tribunal, although it had been decided in different ways by many foreign jurisdictions. Prior to this holding there had been widespread speculation as to whether, under the laws of this State, successive larcenies from the same owner and from the same place, pursuant to a single criminal intent or design, constituted a single larceny, or a series of larcenies which could not be joined together in the same count of an indictment as one larceny. The court in this case adopted the former viewpoint, thereby placing itself on the side of the majority of those tribunals which have decided this question.

The facts in the case were, briefly: The defendant was a turnstile maintainer, employed by a subway system in New York City. He entered into a conspiracy with various station agents to defraud the subway system. He would turn back the meter on the turnstile so that it would appear that fewer people had gone through the turnstile. The station agents would then make their reports agree with the amount to which the meter had been set back by defendant, and they would divide the difference between themselves. Defendant was convicted of first degree larceny in stealing in concert with a station agent named Grower, $1,500 over a period of eleven months.

The defendant appealed upon the ground that since the takings occurred over a period of time and in no single instance exceeded $100, he was guilty only of a number of petty larcenies rather than grand larceny. The court rejected the defendant's argument and stated the rule to be, flatly, "where property is stolen from the same owner and from the same place in a series of acts, these acts constitute a single larceny regardless of the time elapsing between them, if the successive takings be pursuant to a single intent and design and in execution of a common fraudulent scheme."

Therefore, as long as the larceny is pursuant to a single intent, and one complete, illegal scheme, the length of the period of time in which the takings occur, or the number of takings involved, is immaterial. The ultimate question in all such cases is, were the several takings pursuant to several different intents so that each illegal plan was a complete and independent enterprise; or were the several takings pursuant to a single, sustained criminal impulse, and in execution of a general fraudulent scheme? It is only in the latter instance that the takings may be accumulated and prosecuted as one larceny. In this case the court found that the evidence fully supported the conclusion that there were a number of takings in furtherance of a single criminal intent and common fraudulent scheme.

In order that the sweeping implications of this case upon the law of larceny in this State may be appreciated, it is necessary to examine briefly those cases in foreign jurisdictions which the court cites with approval, in support of its reasoning in this case. There is a great variety of factual situations to which the rule in the Cox case may be applied. In Willis v. State, 134 Ala. 429, 33 So. 26, the defendant was a railroad agent who entered into a conspiracy with other employees whereby they shipped freight to

his station under memorandum bills of lading, in order to allow him to defraud the railroad. He failed to report receipts on such bills of lading, and then he divided the profits with his co-conspirators. This went on over a period of two years, during which time there were numerous petty takings in furtherance of this plan. In State v. Wetzel, 75 W.Va. 7, 83 S.E. 68, the defendant was a bank cashier who over a period of three years, almost daily pilfered small amounts of change. These takings he supported by corresponding false entries in the books. Norman v. State, 44 Ga. App. 92, 160 S.E. 522, is illustrative of the same sate of facts as the Wetzel case, except that there was a smallar number of takings in a shorter period of time. In Weaver v. Commonwealth, the defendant took several bundles of silverware from the same house, in different truckloads, at different times, and sold them at different times, to different persons- this over a period of six months.

In State v. Hall, 11 Kan. 458, 207 Pac. 773, the defendant, on one visit to a department store, took articles from three separate floors. An indictment for the aggregate of the thefts was held sufficient and valid. In State v. Kurth, 105 Mont. 260, 72 Pac.(2d) 687, defendant was a water rent collector who, over a period of two years stole a large sum of money, in small individual thefts, by failing to report water rents as he collected them. In State v. Peters, 43 Idaho 564, 253 Pac. 842, the defendant was a stock salesman for a building and loan association. Acting in concert with the treasurer, loans were made upon the alleged purchase of stock which was issued in the names of non-existent persons. The defendant and the treasurer would then divide the proceeds of the loans fraudulently obtained. There were more than twenty of these takings, covering a period of three years. In Reg. v. Firth, II Cox Crim.Cas. 234, the defendant stole more than 1,000 cubic feet of gas from a municipal gas works, over a period of 10 years. He did this by laying a gas main around a meter, with jets on either end, so that the gas received on his business premiseswas not registered on the meter. In this manner some gas was stolen every business day. In Reg. v. Bleasedale, 2 Carr. & K. 765, the defendant stole coal from the beds of more than 30 different owners, over a year's time. An indictment covering in one count all the coal so taken was held valid. In Dodson v. State, 130 Mass. 137, 93 So. 579, the defendant stole, over the course of one winter, 2,300 locust fenceposts from the same plantation. He took them in 20 loads, each one of which he sold to a different person.

In all these cases, the court held that there was but one larceny, arising out of a single criminal intent, in furtherance of a single fraudulent purpose, and not a series of unconnected and unrelated petty larcenies. These holdings demonstrate that the doctrine of the Cox case may be applied to any of a number of different situations where there is a series of thefts in pursuance of one common scheme, from the same owner and the same place, and that the Cox case marks a definite extension of what may constitute a single larceny in this State. In the opinion ofthis writer the extension is definitely welcome, and the case eminently well decided.

PHILIP HARRIS FEINBERG

FREEZING OF ASSETS

COMMISSION FOR POLISH RELIEF v. BANK

The case of Commission for Polish Relief, Ltd. v. The National Bank of Roumania, 262 App. Div.543, decided by the Second Department of the Appellate Division on November 3, 1941, presents an interesting and modern aspect of the law of attachment. The case is noteworthy because it shows the beginning of a number of judicial decisions which will be necessitated to interpret the vast amount of emergency legislation passed in anticipation of and as a result of World War II. The immediate case involves the effect of the President's "freezing orders" on attachments of assets made in this State.

The facts in the Polish Relief case are somewhat complicated, but are nonetheless interesting, because the same facts were newspaper headlines only a year or so ago. The action was originally brought to recover some three million dollars for the alleged conversion by the defendant, the National Bank of Roumania, of gold bars of that value. The facts are largely undisputed.

In September, 1939, Poland was invaded by the German Army. At Warsaw, the Bank of Poland, realizing the city was in imminent danger of falling to the Germans, sought a place of safety for its gold reserve. Before Warsaw fell, the Bank of Poland succeeded in delivering to the defendant National Bank of Roumania at Bucharest 51 cases of gold bars. The defendant bank received the gold and issued its receipt therefor. While the gold was thus held at Bucharest, theBank of Poland transferred its title and interests in the gold to the Polish Food Commission, Inc., a Delaware Corporation organized for the purpose of carrying on relief among Polish refugees. This corporation immediately sent its agents to Bucharest to take possession of the gold. Events in southeastern Europe were at this time transpiring rapidly, and the Nazis then had economic control of Roumania. At any rate the defendant bank refused to give up the gold, stating among other things that it had been claimed by the Germans. Thereafter, the claim to the gold was assigned by Polish Food Corporation, Inc., to the present plaintiff, a domestic corporation, which was also organized to carry on Polish relief.

The instant action was commenced by the issuance of a summons December 18, 1940, and a warrant of attachment on December 19, 1940; it appeared that the defendant bank had in a number of New York banks a large amount of credits and gold. These banks included the Chase National Bank, the Irving Trust Company, and the National City Bank, all of which were served with the warrant of attachment in an effort to attach the funds held by them for the defendant. The defendant immediately moved that the warrant of attachment be vacated on the ground that the Supreme Court of New York had no jurisdiction under the "freezing orders" of the President. In this case, the executive "freezing orders" covering payments of bank accounts of Roumainan nationals, and therefore including the defendants, had been issued by President Roosevelt on October 10, 1940, sometime before the warrant of attachment had been granted.

In order to understand the effect of this decision, it might be well to consider for a moment the nature of these so-called "freezing orders." The authorization for such orders comes from §5(b) of The Trading with the Enemy Act, passed by Congress originally October 6, 1917, and amended by it to meet the present crisis, on May 7, 1940. The Act lists a number of specific acts or transactions which are forbidden except as specifically authorized by the Secretary of the Treasury, if such transactions are "by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature, whatever, direct or indirect." Among the transactions specifically forbidden under this section are:

A. All transfers of credit between any banking institutions within the United States and all transfers of credit between any banking institution outside the United States (including any principal, agent, home office, branch or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals, or exportations of, or dealings in any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

From the apparent meaning of this order, when it was applied to Roumania and its nationals on October 9, 1940, by President Roosevelt, the attachment would be directly within the order. This would seem to be especially true since the Secretary of the Treasury had issued no authorization in the form of license, or otherwise, to the sheriff of the County of New York, or the plaintiff, or the banks, with respect to the bank deposits involved in this action. Certain applications were made to the Secretary of the Treasury for licenses to transfer the amounts deposited to the sheriff for the account of this action, but these were denied without prejudice

The defendant's contention in appearing specially to vacate the attachments was that the bank deposits were rendered unattachable by the Executive Order since said order "blocked" or "froze" its accounts and that as a result the court had no jurisdiction of the cause, there having been no personal service of summons upon defendant.

The court specifically found that the Supreme Court acquired and had "jurisdiction in rem." It further found that even in the absence of a license, the Executive Order did not prevent a valid levy under the attachment upon each of the defendant's bank accounts; that by reason of such levy, the court acquired dominion over the rights and interests of the defendant in such account and that a valid levy upon each bank account had been made, pursuant to the provisions of the Civil Practice Act. The court further held that these bank accounts constituted an attachable res, unaffected by the Executive Order.

In the opinion of the court, the Executive Order merely provided a regulatory plan and operated exclusively in personam upon the banks, and had no further or other legal effect. The Executive Order, according to the Court, has no expropriating effect. Under it, the funds of the defendant have not been taken, but merely their payment or transfer by the banks has been restrained. The court goes back to the fundamental reason behind the "freezing orders" when it says, "the prohibition, as indicated, extends only to the payment or transfer of the funds. Clearly, the sole purpose of the order was to prevent the funds of certain foreign nations, including Roumania, and their nationals from falling into the hands of the aggressor Axis Powers. It is more than clear," says the court, "that neither the Government nor its Executive intended to do away with a creditor's right to attach 'frozen' or 'blocked' funds, or with the debtor's right to assign to another his claim to such funds."

The decision is a good one, and one wholly supportable by a long line of judicial decisions on analogous subjects. There is no doubt that these bank accounts, such as are here involved, are debts due to the National Bank of Roumania which furnish an adequate basis of jurisdiction if seized by legal process. In the case of Erskine v. Nemour Trading Corp., 239 N.Y. 32, where an attachment was attempted to be made on a draft or check, the court said that service of a certified copy of the warrant of attachment is deemed a levy upon, and a seizure of, all the rights of the defendant in or to the said debt. So while the debt cannot be manually seized, the service of the warrant constitutes a seizure thereof under the doctrine of constructive seizure. Even had the court not sustained its holding by former decisions, it seems obvious to me that the court's decision would never have been questioned if the "freezing orders" had not been involved.

As to the court's holding in regard to the "freezing order", this seems to be the only reasonable and natural result. What better way could there be to keep these funds out of Axis hands than to subject them to the claims of the persons from whom they were originally stolen? Any other interpretation would merely "freeze" the fruits of German spoliations in Europe, and that certainly was never the intent of the executive "freezing orders."

RUSSELL ERNEST NEWKIRK